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A QUARTERLY

Editor-in-Chief:
HESSEL E. YNTEMA

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VOLUME IV *Winter 1955* NUMBER I

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CONTENTS—*Continued*

WALTER J. DERENBERG

The Influence of the French Code Civil on the Modern Law of Unfair Competition

I. Historical Background

Even a brief glance at the history of the law of unfair competition will reveal two significant facts: It will show, in the first place, that the entire vast body of the French law of unfair competition (*concurrence déloyale*) is not derived from any special legislation, but finds its origin in two of the most generally worded articles of the *Code Civil* (Articles 1382 and 1383), which announce a general principle of tort law, applicable in all cases where, either intentionally or negligently, damage is inflicted upon another person or his property. In the second place, it will be immediately discovered that the branch of law entitled *concurrence déloyale* was fully accepted and developed by the French courts—and by the courts of most other European countries—before the first mention of the term "unfair competition" appears in American jurisprudence toward the beginning of the 20th Century. The flexible adjustment of the civil law in the field of unfair competition as contrasted with the conservative development of Anglo-American ideas has not always been appreciated even by outstanding specialists in this field of law.[1]

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This article was presented under the title, "The Code and Unfair Competition," in the series, "The French Code and the Common-Law World," offered at New York University by the Institute of Comparative Law in the sesquicentennial celebration of the Code Napoléon, December 13–15, 1954.

Key to periodical abbreviations:

Annales—Annales de la Propriété Industrielle, Artistique et Littéraire, Paris

Annuaire—Annuaire de l'Association Internationale pour la Protection de la Propriété Industrielle (A.I.P.P.I.), Paris

BGE—Entscheidungen des schweizerischen Bundesgerichtes

GRUR—Gewerblicher Rechtsschutz und Urheberrecht

MuW—Markenschutz und Wettbewerb, Monatsschrift für Marken-, Patent- und Wettbewerbsrecht, Berlin

NJ—Nederlandsche Jurisprudentie

PI Revue—Revue mensuelle du Bureau international pour la protection de la propriété industrielle, Berne

Rivista—Rivista della proprietà intellettuale ed industriale, Milano

[1] The late Edward S. Rogers, one of the unforgotten leaders of the bar in the field of trade-mark law and unfair competition, once observed ("New Directions in the Law of Un-

The beginnings of the law of unfair competition in France almost coincide with the end of the French Revolution. A famous statute of March, 1791, not only abolished all guilds and merchant corporations but broadly enunciated the principle that "every person shall be free to engage in such business or to exercise such profession, art or trade, as he shall see fit." As pointed out in a leading law review article,[2] the primary purpose of this legislation was to put an end to guild domination and governmental interference with production. This act thus became, in a sense, the Magna Charta of French business by encouraging free competition in all branches of trade. No provision of the Napoleonic Code interfered with this newly created freedom, and no express mention is found therein of any legal rules against unfair competition. Articles 1382 and 1383 of the *Code Civil*, which have served as the sole and entire basis of the French general law of unfair competition up to the present time, read as follows:

Art. 1382. Any person who causes injury to another by any act whatsoever is obligated to compensate such other person for the injury sustained.

Art. 1383. A person is responsible in damages not only for those acts which he has actually committed but also for any damage caused by his negligence or imprudence.

Within the frame of these two provisions, a body of private law of unfair competition was soon developed by the courts covering so vast a field that it almost defies definition. By the middle of the 19th Century, not one but more than half a dozen outstanding treatises were published in

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fair Competition," printed in New York Law Review, June, 1940, pp. 317–341) that this branch of the law was interesting because it had been "moving swiftly during the past twenty years" and that it "showed the adaptability of the common law to meet changing conditions." He then added (*id.* at p. 341):

"I shall never forget the first conference I had with a French lawyer. He got down a book and said, 'The case that you have stated comes within section so-and-so of the Code, or section so-and-so.' Then he looked at the Code. He said, 'No, it doesn't come within either of these sections. I am sorry, Monsieur, but nothing can be done. There is no law.'

"Under the common law system, however, in effect the parties and the court sit down and figure out what ought to be done, and then do it. The fact that there is no precedent makes no difference at all."

The impression was thus created that there was more inherent flexibility in the common law than in those laws which are based on a civil code. While this statement may be true with regard to some aspects of private law, it hardly applies to that branch of the law which we now embrace within the definition of the law of unfair competition.

[2] Deák, "Contracts and Combinations in Restraint of Trade in French Law—A Comparative Study," 21 Iowa L. Rev. (1936) 397.

France, dealing specifically with the law of unfair competition.[3] By that time, the two cornerstones of the Continental theory were firmly fixed. One of these was the concept of *propriété industrielle*, which comprised not only all industrial property rights based on special legislation, such as patents, trade-marks, designs, etc., but reflected the much broader concept of protecting the entire relationship between a merchant and his clientele. The other collateral concept was a clear realization that the newly gained privilege of economic freedom and free competition should be held limited to those competitive efforts which are the result of a person's own labor and merit and should not be extended to give undeserved sanction to any commercial benefits which are derived from usurpation of the fruits of a competitor's labor. It was this early recognition of the basic principle not to abuse competitive freedom by borrowing from or otherwise taking advantage of the success of a commercial competitor, which led the French courts, without any other statutory basis than Articles 1382 and 1383, to enjoin as acts of *concurrence déloyale* practically all those methods and practices of unfair competition which today in the United States would fall within the administrative jurisdiction of the Federal Trade Commission,[4] but against which only limited protection is given even today by our equity courts in the course of private litigation. In other words, the principles of the law of unfair competition according to the French doctrine are the ever-present general private law foundation, implementing all special legislation regarding designs, trademarks, patents, and copyright which has been enacted from time to time since the coming into effect of the *Code Civil* in 1808 and which has added new and more drastic remedies, both civil and criminal, to those previously available.[5] It would, therefore, be generally correct to say that, as far as Continental theory is concerned, the principles of the law of unfair competition were recognized and en-

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[3] Calmels, Des noms et marques de fabrique et de commerce et de la concurrence déloyale (Paris, 1858); Gastambide, Traité théorique et pratique des contrefaçons en tous genres (Paris, 1837); Rendu (A.) et Delorme, Traité pratique de droit industriel (Paris, 1855) and Traité pratique des marques de fabrique et de commerce et de la concurrence déloyale (Paris, 1858); Mayer, De la concurrence déloyale et de la contrefaçon en matière de noms et de marques (Paris, 1879). The outstanding treatises of more recent origin include Allart (Henri), Traité théorique et pratique de la concurrence déloyale (Paris, 1892), and Pouillet, Traité des marques de fabrique et de la concurrence déloyale (6th ed. Paris, 1912).

[4] For a list of types of unfair methods and practices condemned by the Federal Trade Commission, see Annual Report (1952) 113–118.

[5] For a complete history of this development since 1808, see Roubier, Le Droit de la Propriété Industrielle (Paris, 1952), 494 *et seq.*

forced even before separate statutory provisions were created for trade-mark infringement, patent infringement, and similar types of misconduct.

In thus developing the law relating to *concurrence déloyale* during the 19th Century, the French courts focused their attention on the concept of "*achalandage*," which perhaps does not have an exact counterpart in the English language as it goes somewhat beyond the meaning of "good will" and embraces—to quote one of the early definitions—"the sum of all relations created between a business man and his customers."[6] Within this concept of protection of *achalandage*, the French courts gave early protection, not only in cases of trade-mark infringement and passing-off, but, according to an early authority,[7] to all other acts which are intended to produce confusion by imitation of the exterior characteristics of an establishment, including acts which, without producing confusion, are intended to divert the clientele of a competitor, such as, for instance, commercial disparagement of a competitor's products. Soon included also were instances of commercial bribery, of betrayal of trade secrets, and similar practices. By the end of the 19th Century, the scope of *concurrence déloyale* had assumed such proportions that the more modern French textbook writers no longer even attempt to treat of all varieties of unfair conduct.[8]

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[6] "Cet achalandage qui résulte de la loyauté du fabricant dans ses relations avec le public constitue une valeur aussi digne de protection que la propriété matérielle." Waelbroeck, Cours de droit industriel (Brussels, 1863–1867), "Cours du code Napoléon," t. IX, n. 440.

[7] Fuzier-Herman, Répertoire Général Alphabétique du Droit Français, t. 13, p. 63.

[8] Thus Pouillet, generally considered the outstanding French authority on the subject, begins the discussion of unfair competition in the sixth edition of his work, "Traité des Marques de Fabrique et de la Concurrence Déloyale," (1912), with the following reservations (at p. 716):

"Nous n'avons ni la prétention, ni l'espérance d'indiquer toutes les formes de la concurrence déloyale; nous signalerons les principales, les plus ordinairement usitées; nous sommes sûrs d'ailleurs que les tribunaux, gardiens de la loyauté commerciale, sauront toujours, même en l'absence des règles précises, reconnaître et punir les actes qui y sont contraires."

"We have neither the intention nor the hope to indicate all the forms of unfair competition. We can only point out the most important ones and those most frequently encountered; we feel certain in any event that our courts, as guardians of commercial loyalty, will always be able, even in the absence of specific rules, to recognize and punish any acts which are contrary to the principles of fair competition."

He suggests the following definition of concurrence déloyale:

"La concurrence déloyale c'est l'acte pratiqué de mauvaise foi à l'effet de produire une confusion entre les produits de deux fabricants, ou de deux commerçants, ou qui, sans produire de confusion, jette le discrédit sur un établissement rival."

"An act committed in bad faith with a view toward producing confusion between the products of two manufacturers or of two merchants, or which, without producing confusion, casts discredit upon a rival establishment."

This statement is also quoted in a pioneering article by Dr. Otto Mayer, "Die Concurrence

Thus it happened that, merely as a result of judge-made law and without any other statutory basis than the general provisions of Articles 1382 and 1383, the possibility of a civil action for unfair competition generally exists in France in situations involving any interference with a competitor's clientele, regardless of what form such interference may assume, and available even where the more specific laws for the protection of patents, designs, trade-marks, or works of art may not provide adequate sanctions.

How different and how much slower and more cautious has been the gradual acceptance of the doctrine of *concurrence déloyale* in the United States. Rather than serving as a foundation from which more specific protection against infringement of exclusive rights could be derived, it was—when it was first mentioned 60 years ago—considered nothing but an extension of trade-mark law governing certain instances of passing-off which did not involve technical trade-marks but rather trade names, corporate names, firm names, and the like. Such cases were referred to in the older treatises as involving "rights analogous to those of trade-marks."[9] In a famous article written in 1890,[10] Grafton Dulany Cushing started his study with the observation that "The law of a class of cases analogous to trade-marks is still in the process of evolution, and it may be useful to consider the principles which should govern the decision of cases of this sort." And even this class of cases, not yet referred to as unfair competition, appeared to be limited in those days to different forms of the old passing-off action. The cases known as "analogous to trade-marks" were held to differ from trade-mark cases proper only in that no technical exclusive right could be recognized where a plaintiff used trade names, trade signs, and similar emblems which were incapable, according to common law doctrine, of exclusive appropriation. The author acknowledges that the French courts as of that time had already developed the doctrine of *concurrence déloyale*, which, as he puts it, covered "all manoeuvres that cause prejudice to the name of a property,

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Déloyale," in Goldschmidt, Zeitschrift für Handelsrecht, vol. II, New Series (Stuttgart 1881), p. 363, at p. 394:

Allart, in his much quoted treatise on the law of unfair competition, (*op. cit. supra* note 3, p.v) had the following to say:

"There does not exist a law on unfair competition; the legislator, in fact, can not codify a matter whose elements present an extreme diversity without a sufficient bond to unite them."

[9] *Cf.* Browne, A Treatise on the Law of Trade-Marks, (2d ed. Boston, 1885) c. XII, p. 524 *et seq.*

[10] "On Certain Cases Analogous to Trade-Marks," 4 Harv. L. Rev. (No. 7. February, 1891) 321.

to the renown of a merchandise, or in lessening the custom due to rivals in business."[11]

For a long time, unfair competition continued to be considered as no more than a branch of trade-mark law. Even in 1909 we find statements to the effect that the law of unfair competition was, until then, "practically unknown in the jurisprudence of English speaking nations."[12] A real turning point was not reached until about the time of the publication of the first edition of Nims' *The Law of Unfair Competition and Trade-Marks*,[13] the first treatise to include a treatment of certain miscellaneous forms of unfair competition including such conduct as disparagement of a competitor, interference with a competitor's business, and similar acts. But it was not until the United States Supreme Court's leading decision in the case of *Hanover Milling Co. v. Metcalf*[14] that we find the first expression of the theory that the law of unfair competition was a genus rather than a species, and that "the common law of trademarks is but a part of the broader law of unfair competition."[15] The real genesis of the law of unfair competition in the United States was, or, at least, might have been, the Supreme Court's famous decision in the *International*

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[11] *Id.* 328. After reviewing some of the leading French cases, the author reaches this conclusion (*id.* 332):

"In France commercial morality is high, and the rules as to unfair rivalry in trade are strict. In this country our commercial honesty is proverbially low, and it remains to be seen whether our courts will check the tendency of our business relations towards a lower standard."

Mr. Cushing's hope that our courts would soon apply equally high standards of commercial honesty was partially realized during the following three decades. While still regarded as principally confined to different forms of passing-off, the concept of unfair competition as a separate branch of the law first became noticeable about 1901. At that time, W. K. Townsend, in "Two Centuries Growth of American Law" (New York, 1901) wrote:

"Not yet fully adopted by all the courts, still to be developed in its application to particular circumstances and conditions, this broad principle of business integrity and common justice is the product and the triumph of the development of the law of trade-marks in the last half century, and the bulwark which makes possible and protects the world-wide business reputations common and growing more common in this new country."

[12] For a comprehensive review of the historical development, see Derenberg, Trade-Mark Protection and Unfair Trading (Albany, 1936) 40 *et seq.*

[13] New York, 1909.

[14] 240 U.S. 403 (1916).

[15] *Ibid.* at p. 413. Nevertheless, as late as 1924 a federal court said:

"The law of unfair competition is the natural evolution of the law of trade-marks out o which it has grown."

Coty, Inc. v. Parfums de Grande Luxe, 298 Fed. 865 (2d Cir. 1924). For a full discussion of the development of the doctrine of unfair competition in the United States during the last 75 years, see Haines, "Efforts to Define Unfair Competition," 29 Yale L.J. (1919–1920) 1.

News case,[16] where a determined effort was made to strip the doctrine of some of its historical limitations and particularly of the thought that there could be no unfair competition in the absence of "passing off." Here, for the first time, in an approach similar to that of the French courts, is found a hint that the principle of denying protection to him "who reaps where he has not sown" may form a part of the law of unfair competition.[17] Perhaps that most interesting feature of the majority opinion in the *International News* case was the realization that a distinction should be recognized between the obligations of business men toward the public on the one hand, and the perhaps broader duties and standards to be applied and enforced as between business men themselves.[18]

The liberal doctrine of this case has not been unanimously followed in subsequent years. On the contrary, it is too well known to be elaborated upon here that our courts have refused to apply the doctrine to a multitude of other types of unfair competition and have—with some few notable exceptions[19]—ruled that the *International News* decision should be considered limited to the particular facts there involved.[20] It is true that, from time to time, we find pronouncements to the contrary.[21] True

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[16] International News Service v. Associated Press, 248 U.S. 215 (1918).

[17] *Cf.* Callmann, "He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition," 55 Harv. L. Rev. (February, 1942) 595.

[18] The Supreme Court said in this respect (248 U.S. 215, 239–240):

"The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. . . . Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

[19] See, for instance, Metropolitan Opera Ass'n., Inc. et al. v. Wagner-Nichols Recorder Corp. et. al., 101 N.Y.S. 2d 483 (Sup. Ct. N.Y. 1950).

[20] *Cf.*, Callmann, Unfair Competition and Trade-Marks, 2d ed. (1950), c. 15, p. 875 *et. seq.*

[21] Such as in Ely-Norris Safe Co. v. Mosler Safe Co., 7 F 2d 603 (2d Cir. 1925), at 604:

"Yet there is no part of the law which is more plastic than unfair competition and what was not reckoned an actionable wrong 25 years ago may have become such today."

or in: Premier-Pabst Corp. v. The Elm City Brewing Corp., 9 F. Supp. 754 (D. Conn. 1934), at 758:

". . . In earlier times, the right of identity most frequently was violated by downright misrepresentations by word ('passing off' cases), or by conduct (wrongful appropriation of trademarks); much as the early violations of the right of reputation were by words slanderous, per se. But in the march of commerce, skulduggery seems to have kept abreast of science in inventiveness, so that new and more subtle means were found to violate the right of identity by introducing confusion into the public mind; much as sly innuendoes were substituted for cruder words wherewith to ape and destroy reputations. On the whole these subtleties have found

it is also that the Supreme Court, in the only two subsequent cases in which the meaning of the term "unfair competition" was before it in a different context,[22] again took occasion to emphasize the broader meaning which the term had acquired over the course of years. But it is still indisputable today that the law of unfair competition has not been given the place in our country's legal system which it occupies in most European countries as the broad basis for civil relief against all kinds of interference with a person's reputation, clientele, and business in general.

II. Illustrative Types of Unfair Competition

But more than that: The development of our law of unfair competition has been hampered not only as a result of this rather slow process of emancipation from the narrow concepts of passing-off and trade-mark infringement, but it has also been greatly retarded by judicial retention of some historical concepts of equity law which no longer should have a place in protecting a modern society against unfair trade practices. Here again, the European courts, unhampered by these historical maxims, encountered much less difficulty in awarding effective legal protection than have the courts of our own country. As partial illustrations of these additional difficulties, we shall briefly review three forms of unfair trade conduct which have been part of Continental law of unfair competition almost from the beginning, but which have had—and still have—very slow and inadequate recognition in the United States: commercial disparagement, deceptive advertising, and misappropriation in the form of slavish imitation of otherwise unprotected articles of manufacture.

Commercial Disparagement and "Trade Libel"

Nowhere is the difference in philosophy and approach between the French doctrine and our own law more strikingly illustrated than in the multitude of situations involving the right of a competitor to refer

small favor with the courts, and it is now at least well established that any act or conduct which confuses or tends to confuse the public mind in relation to the identity of the plaintiff or his products is a violation of the plaintiff's right. . . ."

[22] Federal Trade Commission v. R. R. Keppel & Bros., Inc., 291 U.S. 304 (1934); U. S. v. A. L. A. Schechter Poultry Corp., 295 U.S. 495 (1935). In the case of Schechter Poultry Corp. et al. v. United States, particularly, the Court said (*ibid.* at 531–2):

"'Unfair Competition,' as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own, —to misappropriation of what equitably belongs to a competitor. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law."

disparagingly to the merchandise of another for the sole purpose of promoting his own business. When we use the word "disparagingly," we are already unduly limiting the problem since it equally arises—at least under the Continental doctrine—in situations involving a mere comparison of the products for the purpose of gaining a competitive advantage; in other words, it embraces all kinds of so-called "comparative advertising." Concretely speaking: May a competitor advertise: "This antenna" (with a sketch of one television antenna) "OUT-PERFORMS" (with sketches of four other types of antennas and, under each of the four other types) "this antenna"?[23] How would other countries look upon an advertisement such as "BUFFERIN works twice as fast as aspirin"? Would such a comparison be permissible on the ground that the word "Aspirin" in a particular country may have lost its trade-mark significance[24] and may have become a generic term, so that there are numerous "Aspirin" tablets on the market, and would it make any difference whether the advertiser is prepared to prove the alleged truth of such statement?

One glance at the voluminous French literature and that of other European countries reveals that, in striking contrast to our own law, commercial disparagement, including most forms of comparative advertising, has long been regarded as falling within the general law of unfair competition and not as, in the United States, a subdivision of the law of libel and slander. (In common law doctrine, these practices are significantly referred to as "slander of title.") In France, all forms of *dénigrement* have, from the very beginning, been classified as one of the types of conduct falling within the general definition of *concurrence déloyale* and were held actionable on no other basis than the general provisions of Articles 1382 and 1383 of the *Code Civil*. In other words, they immediately fell within the previously mentioned concept of outlawing any competitive conduct which is not based on a person's own skill, labor, and effort but which borrows from or criticizes or attacks a competitor for the purpose of impairing or ruining his business. It is but another form of infringement upon a competitor's *achalandage*, as previously defined. As a result, a merchant under the French doctrine may make grossly extravagant claims for his own product without being civilly liable therefor as long as he does not refer to a competitor or his product at the same time.[25] On the other hand, even statements which do not expressly mention a competitor or his product, but do so by im-

[23] Davis Electronics Co. et al. v. Channel Master Corp., 116 F. Supp. 919 (S.D. N.Y. 1953).

[24] Bayer & Co., Inc. v. United Drug Co., 272 Fed. 505 (S.D. N.Y. 1921).

[25] Pouillet, *op. cit. supra* note 3, at p. 959.

plication, may be actionable. To illustrate: as early as 1884, an English newspaper published in Paris, "The Morning News," inserted in some issues tables comparing the number of copies sold by it with those sold by another newspaper published in Paris in the English language, emphasizing the smaller number sold by the latter. This was held to be unfair competition, and the plaintiff was even awarded damages.[26] This seems particularly interesting in the light of the widely prevailing recent custom among leading magazines and newspapers in the United States to publish comparative figures with regard to the amount of advertising published by each or with regard to their general circulation.

Shortly thereafter, in 1896, the Mutual Life Insurance Company, a United States corporation, was found guilty of unfair competition as the result of circularizing certain prospectuses comparing and criticizing the activities of competitive organizations.[27] In 1904, the firm of Jules Mumm & Co., world famous champagne producers, was found guilty of unfair competition on similar grounds.[28] Hundreds of similar cases could be added but these few extracts will suffice to indicate the extent to which the French civil courts have gone since the enactment of the *Code Civil* in protecting a business man's goodwill and reputation even against comparative advertising.[29] It is, of course, essential that the

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[26] Galignani's Messenger v. Morning News, Trib. comm. Seine, 21 May 1884, Annales 1885, p. 119. The court said:

"The act by the director of the Morning News of using the name of Galignani's Messenger, whether in the said tables or in the different articles, for the purpose of disparaging the journal which bears this name constitutes an abuse and an act of unfair competition, injurious to the plaintiff, which it is proper to bring to an end."

[27] Compagnie d'assurances générales v. Mutual Life, Baudry et Béziat d'Audibert, Paris, 23 June 1896, Annales 1897, pp. 30–32. The court broadly stated:

"The privilege which belongs to every merchant to praise his products in terms, the propriety of which, as a general principle, it is not for the tribunals to determine, does not confer on him the right to attack a competitor or to disparage or to depreciate the articles which he exploits, even by the way of simple comparison, with the aim of diverting the clientele to his own profit. . . . The tribunals are not required in principle to ascertain whether the criticisms formulated by a merchant against his competitor are well founded."

[28] François v. Jules Mumm et Cie., Trib. comm. Reims, 9 Sept. 1904, Annales 1910, pp. 175, 177. The court observed:

"Although it is lawful for every merchant in his circulars to praise the products of his establishment or the establishment itself, on the other hand he is absolutely prohibited from disparaging therein those of his competitors, especially in designating them by name and in terms susceptible of injuring them.

"These acts constitute a grave wrong (faute grave) and an act of unfair competition which has caused the house of Leon Chandon (plaintiff) considerable injury."

[29] For a multitude of similar cases, see Pouillet, *op. cit.*, *supra* note 3, Sec. 1176, p. 961 *et seq.*

comparison or disparagement must occur in public; mere private utterances do not give rise to a cause of action.[30] On the other hand—and this cannot be overemphasized—it is well settled in French jurisprudence that here, as elsewhere in cases of unfair competition, the alleged truth of the statement is not necessarily a defense. "*Dénigrement*," which is found "in any case in which a merchant, not satisfied with praising his own products, depreciates by advertisements or prospectuses those of his rivals,"[31] is equally actionable whether the statements made are true or not.[32]

Before comparing this specific type of unfair trading with the cumbersome and imperfect protection available in the United States, it may not be amiss to glance quickly at the laws of some other European countries which have developed the law of unfair competition into an independent branch of their entire legal systems. In Germany there has never been any serious question, since the enactment of the Unfair Competition Act of 1909, that disparagement and, indeed, all forms of comparative advertising fall within the so-called "general clause" of Section 1, outlawing any competitive conduct which is considered against *bonos mores*. In one of the most recent and thorough studies made of this aspect of German law,[33] the conclusion is reached that any comparative reference to a named competitor is treated as unfair competition by the German Supreme Court except in the following three cases: (a) comparison and reference in self defense as a countermeasure against attack; (b) comparison made upon specific request for purposes of enlightenment (*Auskunft auf Verlangen*); and (c) cases of so-called necessary comparison (*notwendiger Vergleich*), i.e., situations in which a comparison is necessary for the purpose of demonstrating scientific progress rather than for the purpose of enticing a competitor's customers. Other than in these three exceptional cases, the present German rule is stated to be that "It is generally prohibited to refer in any form whatsoever in one's own advertising to a competitor." Or, as the German Supreme Court has said:[34]

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[30] Pouillet, *op. cit. supra* note 3, p. 966.

[31] A. Rendu, *op. cit.* note 3, *supra*, at n. 507: "dans le cas où un fabricant non content d'exalter ses produits, déprécierait par des annonces ou prospectus ceux de ses rivaux."

[32] Mayer, *op. cit.* note 3, *supra*, at n. 35: "Toute allégation qui directement dans la forme tend à déprécier les produits d'une maison rivale, pourra être relevée comme un procédé frauduleux, quelle que soit la vérité."

"Any allegation which directly tends to depreciate the products of a competitor must be treated like a fraudulent transaction, even though the statement may be true."

[33] Droste, "Das Verbot der bezugnehmenden Werbung und die Ausnahmefälle," 53 GRUR 140 (April, 1951).

[34] "Hellegold," GRUR 1931 S. 1301.

"Competitors, even though their commercial accomplishments may in fact be of less value, do not have to tolerate it if they are referred to in competitors' advertisements as means toward increasing the advertiser's own standing in the public eye."

In all cases of such comparative advertising, injunctive relief and damages may be obtained.

Similarly broad is the Dutch law. It may be recalled that Articles 1401 and 1402 of the Dutch Civil Code are exact counterparts of the corresponding provisions of Articles 1382 and 1383 of the French *Code Civil*, and, as in France, the Dutch law of unfair competition is derived exclusively from these general provisions. Disparagement and comparative advertising are quite generally held to be actionable in Holland. The Dutch Supreme Court has so held at least since 1938.[35] In a litigation before the Appellate Court of Amsterdam in 1940,[36] the defendant had advertised: "Diucalc preparations are better than Diuri Tinum." This was held to be unfair competition, regardless of whether the statement was true or not: "The misleading of the public," the Court said, "is not an essential element to make this type of advertisement unlawful." In still another of many significant cases, the District Court of Rotterdam was asked in 1929 to enjoin use of the phrase "Spiran better than Aspirin". This was held to be unfair competition regardless of the truth of the statement.[37] In Belgium, the courts have gone at least as far as those of France and Holland.[38]

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[35] Hoffman la Roche & Co./Nederlandsche Maatschappij, 21 Dec. 1938, N.J. n. 601.

[36] Appellate Court of Amsterdam, Jan. 31, 1940, N.J. 1940, p. 809.

[37] The court there said (Jan. 25, 1929, N.J. 1929, p. 1077):

"Trade ethics do not allow that the manufacturer of a new product introduce his product by merely stating that it is better than that of a competitor, who has spent much time and effort and money to make his mark known. In this way the competitor's mark is used as a ladder to climb into the favor of the public, which is contrary to the carefulness that must be observed in the trade."

Many more illustrations can be found in a comprehensive study by Prof. M. H. Bregstein, "Comparative Advertising as Unfair Competition," published in four installments in Weekblad voor Privaatrecht, Notarisambt en Registratie, July 11, 18, 25, and Aug. 1, 1953. With regard to the British law on comparative advertising, *cf.* the articles on "Slander of Goods," 78 Solicitors' Journal 607 (1934) and 82 Sol. J. 536 (1938).

[38] Thus, it is stated in one of the leading Belgian texts on unfair competition (Fredericq, La concurrence déloyale (Gent, 1935), pp. 58–59):

"Any reference to a competitor's product is unfair competition whether it be true or not. The courts and Belgian jurisprudence have always defended business men against abuses in advertising by condemning any reference to a competitor for the purpose of damaging him or his business; more particularly, it is not permissible to discredit the products of a competitor by comparing them with one's own or those of other competitors. Such comparisons serve only as an effort to take away the competitor's clientele or profit for one's own benefit."

Similar principles, although not as far-reaching with regard to comparative advertising, have long prevailed in Switzerland. As early as 1897, the Swiss Supreme Court protected the Singer Sewing Machine Company of New York against a dealer in competing sewing machines who alleged that the statements made by him in adversely criticising the plaintiff's machines, as compared with the ones sold by him, were true.[39]

So widespread is the recognition today of all species of disparagement as a form of unfair competition that it has even found its way into some international conventions. Thus Article 10 *bis* of the Paris Convention, as revised in London in 1934, now condemns as acts of unfair competition: "False allegations in the course of trade of a nature to discredit the establishment, the goods or the services of a competitor." It will be noted, however, that this section applies only to *false* statements. The Inter-American Convention, as signed at Washington in 1929, after its general clause condemning all forms of unfair competition (Article 20), specifically includes "any other act or deed contrary to good faith in industrial, commercial or agricultural matters . . ."

How different, slow, and generally unsatisfactory has been our own domestic law in this regard and how many historical and technical obstacles had to be surmounted until at least some courts were ready to accept commercial disparagement not as a subdivision of libel and slander but as a form of unfair competition which should be suppressed with the aid of the effective equitable remedy of an injunction. There is no need here to reiterate the numerous reasons why our courts have been so reluctant to give equitable relief in cases of this kind. All these have been thoroughly analyzed and criticized in a famous article by Roscoe Pound,[40] and in the writings of Harry B. Nims.[41] Suffice it to say that

[39] The Swiss Supreme Court significantly said (Schweizerisches Bundesgericht, Nov. 23, 1895, GRUR 1897, p. 110):

"On the other hand we cannot hold that the mere fact that the disparaging statements are true makes the disparagement always lawful. There are circumstances under which even the dissemination of true facts may be regarded as unfair competition. For instance, if a business man makes it a practice to refer to his competitor's past, if certain irregularities that in fact occurred are maliciously exploited, furthermore in all cases where true facts are stated in such a way that the rival's reputation as a business man is unjustly discredited, an action for unfair competition lies."

[40] "Equitable Relief Against Defamation and Injuries to Personality," 29 Harv. L. Rev. (April, 1916) 640.

[41] Nims, Unfair Competition and Trade-Marks, 4th ed. (1947) c. XVII, p. 830. *Cf.* also, the most recent valuable study, "The Law of Commercial Disparagement: Business Defamation's Impotent Ally," 63 Yale L.J. (November, 1953) 65, and Notes, West, "Recent Trends in Trade Disparagement Doctrines in Relation to Unfair Competition," 13 Geo. Wash. L. Rev. (1945) 468, and "Trade Disparagement and the 'Special Damage' Quagmire," 18 Chi. L. Rev. (1950) 114.

no Continental lawyer, versed in the general doctrine of *concurrence déloyale*, would ever condone—or even understand—the New York Court of Appeals' well known decision in the *Marlin Firearms* case which has never been expressly overruled up to the present time.[42] In the *Marlin* case, it will be recalled, an injunction was sought against a magazine whose publisher had maliciously published disparaging statements about the plaintiff's merchandise. It was held that equitable relief was unavailable for a number of historical reasons, all based on libel and slander law. Inability to prove "special damage," the Constitutional guarantee of freedom of speech and of the press, the right to a jury trial, etc., were among the many reasons which led the court reluctantly to refuse any speedy relief and to relegate the plaintiff to an entirely inadequate action at law for damages. There was no indication that the defendant's conduct may come within the concept of unfair competition, which itself had not been fully recognized at the time of this decision (1902); instead, the disparaging statements were referred to as "slander of title," which required proof of "special damage" and for which no equitable remedy would lie.[43]

It was not until 1928 that a lower New York court first indicated that, notwithstanding the *Marlin* case, a systematic effort by a competitor resulting in a campaign of false disparagement of the plaintiff's product, should be considered a form of unfair competition in order to get away from the unfortunate doctrine of the *Marlin* case[44] which, in Dean Pound's words, "puts anyone's business at the mercy of any insolvent

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[42] Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163, 59 L.R.A. 310 (C.A. N.Y. 1902). On the contrary, in the recent case of Eversharp, Inc. v. Pal Blade Co., 182 F. 2d 779 (1950), the Court of Appeals for the Second Circuit held that, since the New York Court of Appeals in the more recent case of Advance Music Corp. v. American Tobacco Co., 70 N.E. 2d 401 (1946), in which the requirement for special damages was somewhat modified, had not once mentioned the Marlin case, the latter still remained the law in New York so that the publication of untrue, disparaging statements should not be restrained by injunction.

[43] Dean Prosser, in his textbook on Torts (1941) observes at p. 1036: "Because of the unfortunate association with 'slander,' a supposed analogy to defamation has hung over the tort like a fog, concealing its real character, and has had great influence upon its development, the plaintiff's title of property seems to have been regarded as somehow personified and so defamed." The inadequacy of the present state of the law with regard to commercial disparagement in all its aspects is most convincingly set forth in the Note by West, *supra*, note 41.

[44] H. E. Allen Mfg. Co., Inc. v. Smith, 224 App. Div. 187, 229 N.Y.S. 692 (N.Y. Sup. Ct. App. Div. 1928). Said the court:

"The courts have been increasingly inclined to protect business interests even when such interests do not come within strict definitions of property. The judgment here, in enjoining false and fraudulent disparagement, protects the intangible, but real, relationship existing between a merchant and his usual customers—his 'goodwill'."

malicious defamer, who has sufficient imagination to lay out a skillful campaign of extortion."[45] Another New York State court of first instance stated even more bluntly that cases of commercial disparagement involved more than the mere publishing of a libel and may, in fact, constitute unfair competition.[46] It will thus be seen that in these fairly isolated cases, an approach is made to classify such competitive conduct as a type of unfair competition in the sense in which it has become an acknowledged part thereof in countries which have followed the lead of the French courts. However, how far we still lag behind becomes again obvious when it is considered that relief has been granted only in cases involving flagrantly false or unfair statements, and not in cases involving mere comparative advertising of the types previously discussed. On the contrary, what little authority there can be found in this country with regard to that problem points in the other direction. Consider, for instance, the fairly recent case of *National Refining Co. v. Benzo Gas Motor Fuel Co.* (1927),[47] in which the court, in an unusually comprehensive opinion, distinguished three different types of commercial disparagement as follows: (1) the disparagement includes libelous words in reference to the person of the vendor or producer; (2) the statement refers merely to the quality of the goods or products of another; and (3) statements "where the alleged libelous statements amount to no more than assertions by one tradesman that his goods are superior to those of his rival." It was held that in cases such as type (2) no recovery may be had in the absence of proof of special damage and that in cases falling within category (3)—the category with which we are here concerned—*no* recovery can be had although the statements may be false and malicious and even though "special damage" may be alleged. This is certainly a far cry from protecting and promoting commercial honesty and fairness in trade. No wonder, then, that those groups in the United States which

[45] 29 Harv. L. Rev. (1916) 640, at 668.

[46] Old Investors' & Traders' Corp. v. Jenkins et al., 232 N.Y.S. 245 (N.Y. Sup. Ct. 1928). The court said:

"The mailing or sending of false, untrue, and dishonest statements to the customers of an established firm, for the purpose of injuring the firm in its business and deceiving the public and plaintiff's customers, is a form of unfair trade competition which can be as injurious as the establishment of a competitor in the neighborhood using the same or a similar name and circularizing the firm's customers for the purpose of confusing them and obtaining their patronage."

The decision in Dehydro, Inc. v. Tretolite Co., 53 F. 2d 273 (N.D. Okla. 1931) is to the same effect: "Where the gravamen of the action is to enjoin unfair competition, the question of libel and slander is only incidental to the action, and such an action is not one to enjoin a libel or slander."

[47] 20 F. 2d 763 (8th Cir. 1927).

condemn comparative advertising but have come to realize the inadequacy of legal protection in this field, have resorted to self-help and are trying through organizations such as the National Better Business Bureau and others to enforce higher standards of advertising. It is an interesting fact, for instance, that, according to an agreement among the leading newspaper publishers, no advertisements will be accepted in which a product is advertised in terms of a comparison with a named competitor's product, since such conduct is considered unethical, even though not actionable under our law. Significant, too, were the many code provisions during the administration of the National Recovery Act which almost uniformly condemned comparative advertising as an unfair practice.[48] Even the Federal Trade Commission, although created solely for the protection of the public, has found it necessary to include commercial disparagement among the trade practices which the Commission may prosecute as unfair acts and practices under Section 5 of the Federal Trade Commission Act.[49] But even that is a long way from adoption of a general rule which would afford the equivalent of the speedy private remedies which are available under most Continental laws in cases of this kind. Reliance, not on one's own merits but on the alleged inadequacies of somebody else's product, has never yet been condemned by our courts as it has been in Europe, even though the basis for this Continental approach—it may be re-emphasized—is entirely judge-made and derived exclusively from a liberal and constantly progressive judicial interpretation of Articles 1382 and 1383 of the French Code and similar provisions in other European countries.

False Advertising and False Designations of Origin

There are undoubtedly more French trade names and designations of origin of world-wide celebrity than of any other country. This is particularly true, of course, of the names of wines, porcelain, cheese, women's fashions, and many others. Hence the lead which French jurisprudence and legislation have taken toward protection of such designations and names, even though they may not qualify for registration as trade-marks.

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[48] See 63 Yale L.J. 65, note 41, *supra*, at 66 *et seq.* For illustrations, see Lee, Business Ethics (1926) at 87; Taeusch, Policy and Ethics in Business (1931) at 445. For a thorough review of the entire subject, see Wolff, "Unfair Competition by Truthful Disparagement," 47 Yale L.J. (June, 1938) 1304.

[49] The 1952 Annual Report of the Federal Trade Commission includes, among "Types of Unfair Methods and Practices," the following: "7. Making false and disparaging statements respecting competitors' products and business, in some cases under the guise of ostensibly disinterested and specially informed sources or through purported scientific, but in fact misleading, demonstrations or tests."

There never was much question in France and in those countries which have followed its lead, that misuses of such words as *Cognac*, *Limoges*, *Roquefort*, and innumerable others, should be actionable not only on behalf of the Government but also on behalf of those whose private interests in the honest use thereof were impaired. Nor was there any doubt that the general provisions of Articles 1382 and 1383 of the *Code Civil* provided a sufficient basis for such protection, although special legislation was enacted by an Act of July 28, 1824,[50] which makes a misuse of a manufacturer's name or place of manufacture a misdemeanor. With the enactment of the Trade-Mark Act of June 23, 1857,[51] even broader statutory provision was introduced in France, going beyond the Act of 1824 by extending the provisions of that Act not only to names and places of manufacture but to all those indications of origin, be they registrable as trade-marks or not, which have acquired distinctiveness in trade. What is particularly interesting for our purposes is not, however, the fact that false advertising of this type, particularly with reference to famous designations of origin, may be the basis of a civil action but the early recognition of the necessity to make such private action available to every member of the business community whose interests might be adversely affected by such improper use. In other words, French jurisprudence considers the celebrity of a well-known designation of origin as a sort of community right in which all those located there may participate. In that sense, the concept of *propriété d'un nom de lieu* is recognized.[52] In view of this broad property concept, there was never any doubt, therefore, that most instances of false advertising and particularly those involving the use of false designations of origin were action-

[50] Law of July 28, August 4, 1824, relative aux altérations ou suppositions de noms dans les produits fabriqués.

[51] Law of June 23, 1857, sur les marques de fabrique et de commerce, modified by the Law of May 3, 1890.

[52] Thus it is said in one of the early textbooks (Gastambide, note 3 *supra*, n. 60):

"Telle localité est renommée pour ses draps, telle autre pour sa coutellerie etc; cette bonne réputation est la propriété de la ville ou de la contrée qui a su l'acquérir, elle est la propriété de tous les fabricants établis dans cette contrée ou dans cette ville."

"This locality is famous for its sheets and that other for its cutlery; this great reputation belongs to the business community or the region which has been able to acquire it. It is the property of all manufacturers established in this particular community or city."

This concept of community participation in the celebrity of the name was expressed even during the debate on the Act of July 28, 1824 (Dalloz, Jurisprudence générale, Répertoire et Supplément, V° Industrie et commerce, n. 350):

"Il est des villes de fabrique dont les produits ont une réputation qu'on peut appeler collective, et c'est encore une propriété."

"There are industrial cities the products of which have a reputation which may be designated as collective, and this is also an object of property."

able at the suit of anyone whose interests were adversely affected. It is interesting to note that, according to French practice, the right to institute a private action in such instances may be enjoyed not only by those who live directly within the boundaries of the locality but even by those who live within a reasonable distance thereof, as long as an "internal connection" exists between the well-known designation of origin and the actual place of manufacture.[53] A private right of action lies not only in cases involving false designations of origin but against most other forms of fraudulent or deceptive advertising as well. Thus, a competitor was held entitled to sue where the value of bankrupt stock offered by two merchants was deceptively advertised.[54] Similarly, announcements to the public of liquidation sales and similar sales which were not in fact intended and carried out as such have been held to be unfair competition, actionable at the suit of any competitor in the same town who may be damaged thereby.[55]

Most European laws provide not only for criminal sanctions but for private suits based on unfair competition in cases of this kind. Thus, the German Unfair Competition Act of 1909 broadly provides that, in all cases falling within the general unfair competition clause of Section 1 (cases against *bonos mores*) or within the specific prohibitions of Article 3 regarding false designations of origin, deceptive descriptions, etc., "a private suit for an injunction may be brought by any merchant who manufactures or does business in merchandise or services of the same or similar nature." In addition, private groups, such as trade associations in the particular industry involved, are entitled to sue for an injunction. Under certain circumstances (defined in Section 13 of the German Act of 1909), the court may even award damages in its discretion in cases of this kind.[56] Similarly, the highest Swiss court has held that a private action for unfair competition may be instituted even by a person whose personal interests are only indirectly affected.[57]

In the United States, certain historical concepts and technicalities had first to be surmounted before we could begin to adopt the same approach which has long formed the cornerstone of the law of unfair competition in many European countries. In considering this vital problem, our courts found themselves confronted with the age-old equity maxim that

[53] Pouillet, note 3 *supra*, p. 446.

[54] Trib. comm. de Rouen, 4 June 1877, Lévy, Jacob et Legrande v. Francfort et Kahn, Annales, 1877, p. 258.

[55] Lévy v. Saintin et Flisseau, Sirey, Recueil Général des Lois et des Arrêts, 1892, II, p. 202.

[56] Reimer, Wettbewerbs- und Warenzeichenrecht (1954), p. 836 *et seq.*

[57] Migros A. G. v. Tanner, BGE 58 II, p. 430 (1932).

equity only concerns itself with "property rights" and that deception of the public and only indirect damage to a competitor or a group of competitors were insufficient bases for a private action in the absence of an established "property right." It proved somewhat difficult for our courts to recognize the type of community property right in the name of a famous locality in connection with products produced or manufactured there. Thus, a Federal court held in 1890 that a deceptive use of the name "Rosendale" by someone not located there could not be enjoined by a competitor who was so located. Since no "property right" of the plaintiff was infringed, he was held to have no right to act as "vicarious avenger of the public" or of those who actually did business at Rosendale.[58] Fortunately, this narrow doctrine did not remain the law even with regard to false designations of origin. One year after the "Rosendale" case, a federal court said with regard to a deceptive use of "Karlsbader Wasser:"[59] "The fact that many have a common interest in the same subject-matter ought not to deprive one of the many from being protected against an injury to the whole." In more recent years, an association of Grand Rapids furniture dealers was afforded effective relief against a defendant who made a deceptive use of the word "Grand Rapids" in connection with his furniture store in Chicago,[60] but still more recently it was held that a large group of California manufacturers had no standing to sue two New York concerns for alleged misuse of the name "California" in connection with men's shirts and similar articles.[61]

With regard to the use of false descriptions other than designations of origin, our courts have, in the past, expressed even greater reluctance to permit class actions or *qui tam* actions on behalf of one or a group of injured competitors. Here the celebrated *Aluminum Washboard* case[62] comes to mind which has never been expressly overruled by any subse-

[58] New York Cement Co. v. Coplay Cement Co., 44 Fed. 288 (C.C. E.D. Pa. 1890) and 45 Fed. 212 (C.C. E.D. Pa. 1891). Particularly interesting is the following observation of the court:

"No man can maintain a private action for a public nuisance, though he is injured by it, unless his injury is of a special character different from that which is sustained by the public generally. This is a sound rule of the common law. It is intended to prevent vexatious litigation."

[59] City of Carlsbad v. Tibbetts, 51 Fed. 852, at 856 (Mass. 1892).

[60] Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F. 2d 245 (7th Cir. 1942).

[61] California Apparel Creators et al. v. Wieder of California, Inc. et al., 162 F. 2d 892 (S.D. N.Y. 1946). *Cf.*, 174 ALR 496 (1946).

[62] American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (6th Cir. 1900); *cf.* Handler, "False and Misleading Advertising," 39 Yale L.J. (1929) 22 and Callmann, "False Advertising as a Competitive Tort," 48 Col. L. Rev. (1948) 876.

quent court decision (although, as will be pointed out immediately, it should be considered in effect overruled by Section 43 of the Trade-Mark Act of 1946). In that famous case the defendant had used the word "aluminum" for washboards which actually did not contain that metal. Plaintiff company, at that time the only manufacturer in the country actually to use aluminum, brought suit on the theory that its trade would be greatly damaged by the defendant's misuse of the word "aluminum" even though the defendant was not guilty of passing off but used his own name. In denying plaintiff all relief for fear that otherwise a "Pandora box of litigation" would be opened, the court accused the plaintiff of having lost sight of "the thoroughly well established principle that the private right of action in such cases is not based upon fraud or imposition upon the public but is maintained solely for the protection of the property of the plaintiff," and observed[63] that "There are many wrongs which can only be righted through public prosecution and for which the legislature and not the courts must provide a remedy."

Not until 46 years later was the court's hint that this was a matter for the legislature rather than the courts accepted in what is now Section 43 of the Trade-Mark Act of 1946.[64] Prior to 1946, the doctrine of the *Aluminum Washboard* case remained the law even though Judge Learned Hand had made a courageous effort in the *Mosler Safe* case[65] to bring misrepresentations of the "Aluminum Washboard" type within broad general principles of unfair competition. Judge Hand's decision was reversed by the Supreme Court[66] for lack of a showing that the plaintiff was, in fact, the *only* competitor who might have suffered damage as a result of the defendant's fraud. There was no suggestion that quite apart from the question of damages, the plaintiff, as direct competitor, should have a right to secure at least injunctive relief for the protection of his own business as well as for the benefit of all those who might be similarly situated. In the meantime, both the International Paris Convention of 1883 and the Inter-American Convention of 1929 had included broad provisions against any deceptive use in international trade of false designations of origin and other false descriptions. Thus, Article 10 of the Paris Convention provides for Convention protection in all cases in which a product may "falsely bear as indication of origin the name of a specified

[63] 103 Fed. 281, at p. 285.

[64] A previous legislative attempt to remedy the situation was made in Section 3 of the Supplementary Trade-Mark Act of March 19, 1920. The section proved entirely ineffective because it was restricted to "willful" misrepresentations and limited to false designations of origin.

[65] See note 21, *supra*.

[66] Mosler Safe Co. v. Ely-Norris Safe Co., 273 U.S. 132 (1927).

locality or country . . ." and Article 21(b) and (c) of the Inter-American Convention pledges protection against unfair competition, not only in case of use of false designations of geographical origin but also in any other case involving "the use of false descriptions of goods by words, symbols or other means tending to deceive the public in the country where the acts occur with respect to the nature, quality or utility of the goods."

Since it was one of the purposes of the new Trade-Mark Act of 1946 "to carry out the provisions of certain international conventions," it was deemed necessary to implement the just-quoted Convention provisions by domestic federal legislation. For this purpose Section 43 was enacted, which now creates a civil action on behalf of any person located in a falsely indicated locality or damaged by any other false description or representation. Thus we have now, by statutory federal enactment, over a century after such class actions were first recognized in Europe, an extension of the private law of unfair competition which is no longer based on an anxious search for an alleged "property right" on the plaintiff's part but designed as an effective and expedient weapon against unfair deceptive practices by business competitors. It seems strange indeed that, until midway in 1954, no reported case could be found in which an action for unfair competition was based on this section.[67] But then, in July 1954, the Court of Appeals for the Third Circuit handed down its decision in *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*,[68] in which, for the first time, the far-reaching scope of Section 43 is indicated. Here the court in effect declared the *Aluminum Washboard* case overruled by legislation.[69] The importance of this judicial precedent cannot be overestimated. No longer will it be necessary to wait until the Federal Trade Commission may, in the exercise of its administrative jurisdiction under Section 5 of the Federal Trade Commission Act, issue a cease and desist

[67] The only two cases in which the section was referred to until then, Samson Crane Co. v. Union National Sales, Inc., et al., 87 F. Supp. 218 (D. Mass. 1949), a labor dispute, and Carpenter v. Erie R. Co., 178 F. 2d 921 (2d Cir. 1949), misrepresentation regarding medical services, bear no similarity to the type of case to which the section applies.

[68] 214 F. 2d 649 (3d Cir. 1954).

[69] It said (*ibid.* at 651):

"It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has given a broad class of suitors injured or likely to be injured by such wrong the right to relief in the federal courts. This statutory tort is defined in language which differentiates it in some particulars from similar wrongs which have developed and have become defined in the judge made law of unfair competition. Perhaps this statutory tort bears closest resemblance to the already noted tort of false advertising to the detriment of a competitor, as formulated by the American Law Institute out of materials of the evolving common law of unfair competition. See Torts Restatement, Section 761, *supra*. But however similar to or different from pre-existing law, here is a provision of a federal statute which, with clarity and precision adequate for judicial administration, creates and defines rights and duties and provides for their vindication in the federal courts."

order against false designations of origin or other misrepresentations after several years may have passed, but a private remedy has now become available to get speedy injunctive relief in cases of this kind. A most important step was thus taken to liberate the law of unfair competition from the traditional limitations of the old equity action for passing off.

Misappropriation, Free Ride, and "Slavish Imitation"

It would seem to be almost a foregone conclusion that in those countries which, like France, frown upon any unfair exploitation of a competitor's reputation or work in the promotion of one's own efforts, most forms of "taking a free ride" or "slavish imitation" would also fall within the condemnation of the courts, even though there be no direct evidence of substitution or passing off. But since it was France which first pronounced the principle of free competition as one of the early results of its Revolution, it might have been expected that free competition should have been held to prevail with regard to the copying of all those designs and functional features of articles which are not separately protected by special legislation. It would not have been surprising, then, if French jurisprudence had reached the conclusion that the general provisions of Articles 1382 and 1383 of the *Code Civil* could not be resorted to even for the purpose of avoiding a likelihood of deception of the public wherever this likelihood results from the copying of otherwise unprotected external features of an article of manufacture.[70]

[70] Thus it was said in one of the leading decisions by the Cour de Cassation (April 27, 1937, Sté Monotype v. Sté la Monographe, P. I. Revue 1937, s. 203):

"Attendu qu'à bon droit l'arrêt décide, que le principe de la liberté du commerce et de l'industrie s'oppose à ce que la fabrication et la vente des pièces détachées que ne protège plus aucun brevet, soient considerées comme des actes de concurrence illicite ou déloyale; . . ."
"Whereas it is with good reason that the court decided that the principle of freedom of commerce and industry is opposed to considering the manufacture and sale of articles unprotected by patent as acts of illegal or unfair competition. . ."

Similarly, two leading French jurists, Fernand-Jacq and Demousseaux, in a report to the Budapest Congress of the International Association for the Protection of Industrial Property in 1930, said (Annuaire 1930, s. 425):

"Depuis la proclamation des droits de l'Homme et du Citoyen, tout au moins, et déjà même avant, les législations de tous les pays civilisés admettent, comme base fondamentale de l'activité humaine, la liberté du commerce et de l'industrie; les restrictions apportées par certaines dispositions des codes et des lois spéciales sont motivées par les abus, qui, sous le couvert de cette liberté de principe, permettraient de porter atteinte à la morale naturelle, c'est-à-dire aux usages loyaux, qui doivent présider aux transactions commerciales et industrielles."
"Since the proclamation of the rights of man and the citizen at least and even before, the governments of all civilized countries admit, as a fundamental basis of human activity, the freedom of commerce and industry; the restrictions brought to bear by certain provisions of the codes and special laws are directed solely against abuses, which, under the guise of that principle, would run counter to good business morals, i.e., principles of fair competition which must control commercial and industrial transactions."

However, we must not lose sight of the fact that in France—as well as in most other European countries—there is far greater specific protection for models, designs, and works of art than is available in the United States. In connection with industrial designs, for instance, and works of the applied arts, the Act of July 14, 1909, created special protection without any elaborate system of pre-examination for all those ornamental designs which are duly recorded. The provisions of this Act established a private right for all inventions "as to form" (*droit commun des inventions de la forme*).[71] The deposit of such design creates a presumption of ownership. In addition to this type of design protection, those technical features of an article which may be capable of patent protection under the French Patent Law of July 5, 1844,[72] may find additional protection under that Act. Moreover, since the French copyright law is governed by the overall principle of the "unity of art" (*unité de l'art*), the same artistic features may also gain additional protection under the French Copyright Act of 1793.[73] According to the leading French treatise on protection of works of applied art,[74] toy models fall within the design statute, as do textile designs even with regard to their color nuances and effects. The creations of high fashion (*haute couture*) are usually classified as works of art and even such things as hats, artificial flowers, embroideries, and others may enjoy statutory protection in France under either the Copyright or the Design Statute. Jewelry, silverware, ceramics, and similar objects of the applied arts are likewise held capable of copyright protection. It should also be remembered that an act of infringement (*contrefaçon*) under any of these statutes does not only give rise to a civil action but may be a criminal offense at the same time. It is, therefore, particularly significant to note that, despite this very large scope of special statutory protection, it is still recognized that an action based on the general provisions of Articles 1382 and 1383 of the *Code Civil* may lie as a supplementary remedy in some instances of "*imitation servile*" which do not fall within any of the accepted statutory categories. Thus, with regard to industrial designs of the type of the German "small patents" (*Gebrauchsmuster*), the French law does not give separate statutory protection. In other words, a great many of these so-called *modèles de fabrique* have remained outside of both the patent and copyright law as well as the design statute. The result has been that, as a general rule, the courts have granted protec-

[71] Triboulet-Arsandaux, La Protection des oeuvres françaises d'art appliqué (1936), s. 43.

[72] Law of July 5, 1844, sur les brevets d'invention.

[73] Laws of July 19 and 24, 1793, modified by the Law of March 11, 1902, loi sur la propriété artistique et littéraire, étendue à l'art industriel.

[74] Triboulet-Arsandaux, *op. cit. supra.* note 71, at p. 37.

tion against slavish imitation of such designs on the basis of Article 1382 of the *Code*.[75] "Slavish imitation," said the Appellate Court of Paris as early as 1854,[76] "demonstrates that the imitator did nothing but take advantage of the results of the skill and labor of somebody else."

On the whole it can be said with some assurance that original models and designs of any kind are broadly protected in France by a series of statutes with a minimum of formality requirements and that in those cases in which such statutory protection is unavailable, the imitation either concerns such trifling or obvious aspects as are not worthy of protection even under the most liberal standards or are in fact protected, if they are found worthy thereof, under the overall provisions of Articles 1382 and 1383 of the *Code*. In this way, the courts and the numerous private organizations, which were created in France for the protection of artistic designs in various industries, have been fairly successful in their own country in enjoining design piracy in all branches of industry despite the fact that, particularly in recent years, the French courts and jurisprudence have taken as their starting point the rule that slavish imitation of those relatively few designs which are incapable of separate statutory protection does not—without more—constitute an actionable wrong.[77] At the same time it is held that where the imitation is accompanied by other circumstances resulting in the possibility of deception and intended for that purpose, the general sanctions of the *Code Civil* may, in a proper case, be called upon to implement both the criminal and civil provisions of the design statute and other kindred legislation.

Before examining our own law with regard to this problem, we might take a quick look again at the law of a few other leading European countries. Let us begin with Germany.[78] After many turbulent years of controversy, it is now generally recognized that so-called "*sklavischer Nachbau*" (slavish imitation) without more is not deemed unfair competition under the general clause of Article 1 of the Act of 1909; in other words, it is not considered by itself to be against *bonos mores*. It is equally well settled, however, that while not illegal *per se*, it may become so in

[75] This is also the view expressed by Prof. Roubier in his recent admirable textbook, Le Droit de la Propriété Industrielle (Paris 1952) at p. 495. Roubier cites numerous recent cases to the effect that the reproduction and imitation of industrial designs may constitute an act of unfair competition, even though the designs as such are in the public domain. If they are so offered to the public as to create a possibility of confusion in any manner, a cause of action in unfair competition under Article 1382 of the French Code will lie.

[76] Calmels, *supra*, note 3, at n. 40.

[77] Fernand-Jacq and Demousseaux, Annuaire 1930, s. 423.

[78] For a list of the voluminous German literature on this point, see Henssler, Urheberschutz in der Angewandten Kunst und Architektur (Stuttgart-Köln 1950), p. 116 *et seq.*

any situation in which an imitator of nonfunctional features fails adequately to protect the public against confusion which may result from the identical appearance of the two products. In this regard, the mere use of the competitor's name on the imitated product would almost certainly be held to be insufficient in any case in which the overall appearance of the products involved—in their nontechnical aspects—is so closely similar that ultimate confusion appears unavoidable.[79]

In evaluating the present policy of the German courts, we must again bear in mind that the vast majority of designs, both industrial and ornamental, are effectively protected by special statutes which provide both criminal and civil sanctions.[80] In addition, Section 25 of the German Trade-Mark Act of May 5, 1936 provides a statutory cause of action against any form of infringement of the "getup" (*Ausstattungsschutz*) of a person's merchandise. This provision, while not covering ornamental designs of articles of the applied arts or of machines, does apply to all packages, containers, bottles, envelopes, etc. which have become known in the trade as a concern's distinctive emblem. As a result, there appears

[79] In a much quoted decision of the German Supreme Court (in 1928) involving imitation of a new type of hat hook, the following general guide was laid down (Huthaken-Entscheidung, 31 Jan. 1928, GRUR 1928, S. 289):

"Articles coming within the protection of the Patent or Small Patent (Gebrauchsmuster) statutes will not receive supplemental protection under unfair competition once the patent or small patent has expired or had become invalid. The same is not true, however, for mere ornamental designs since the same reasons of public policy do not apply here; but even with regard to designs, protection in unfair competition may occasionally be available where the product involved is a commercially mass-produced article which the public does not associate with one particular source of manufacture."

But in 1940 the German Supreme Court modified this rule by broadening the applicability of the unfair competition statute as follows: (18 May 1940, MuW 1940, S. 147):

"It is true that slavish imitation of an article not protected or no longer protected by patent is not itself an act of unfair competition even though objectively some likelihood of confusion may exist. In order to find unfair competition, there must be additional factors which render the imitation *contra bonos mores*. Such factor is found above all wherever there is an intent to mislead the public as a result of a deliberate leading of the public into error with regard to the origin of the imitator's product."

The latest word in this regard was spoken by the new West German Supreme Court in a comprehensive decision of March 12, 1954. The case involved, *inter alia*, slavish imitation of certain external parts of a machine on which a small patent (Gebrauchsmuster) had expired. Here the Court in elaborating on the previously mentioned decision of the predecessor court, said (12 March 1954, GRUR 1954 (July–August) p. 337):

"Slavish imitation may be a violation of Section 1 of the unfair competition statute in case of a uniquely designed product of above-average distinction wherever the imitator markets the imitated product without being concerned at all about the possibility of confusion or without taking all steps which may be necessary to prevent confusion."

[80] Gebrauchsmustergesetz, 1 June 1891; *cf.* two recent commentaries, Furler, Das Internationale Musterrecht (Berlin, 1951) and same, Das Geschmacksmustergesetz (Berlin, 1950).

to be no greater need for supplementary protection against slavish imitation under the German law of unfair competition than there was found to exist under the French law.

The law in Italy and Switzerland—to mention only two more countries—is similar.[81] Switzerland, too, has liberal provisions with regard to the protection and registration of ornamental designs (Act of March 30, 1900), although with the exception of technical models in the watch industry, the Swiss law does not know the "small patent" of the German law. According to the Swiss Supreme Court, any design which may have a peculiar aesthetic effect on the onlooker may qualify as an original design. As a result, the mere arrangement of lines may qualify for such protection.[82] Technical elements which may approach the German concept of *Gebrauchsmuster* are protected in Switzerland by a very liberal interpretation of the requirements of "invention" under the Swiss Patent Statute.[83] Moreover, watch models and lace designs are regulated and protected by special statute. In addition to the design and patent law, the Swiss Copyright Act also affords a considerable measure of copyright protection to artistic designs. However, similar to the French and German jurisprudence, the Swiss Supreme Court has recognized that, while slavish imitation as such may not be unlawful, it may well become so if accompanied by a purpose to capitalize upon a competitor's reputation and to exploit the commercial success of his merchandise. It would appear that Swiss jurisprudence in permitting supplementary reliance on Article 1 of the Swiss Statute against acts of unfair competition[84] goes even further than the German courts because the general clause of Article 1 of the Swiss Statute does not refer to acts against public *bonos mores*, but still more broadly reads that

"Unfair competition under this act is any misuse of commercial competition by deceptive or any other means which run afoul of the principles of bona fides (*Treu und Glauben*) between competitors."

As a result, the Swiss Court in a leading decision of September 1931,[85] reached the conclusion that Article 1 of the Unfair Competition Act may be invoked even in cases of slavish imitation of otherwise unprotected

[81] One of the most complete recent studies of the problem is the excellent dissertation by Blum, Schutz der Immaterialgüter vor sklavischer Nachahmung auf technischem Gebiet (University of Zurich); *cf.* also, Troller, Der Schweizerische Gewerbliche Rechtsschutz (Basel, 1948) p. 89 *et. seq.*

[82] BGE 29/2/365.

[83] BGE 23/1865, 38/2/714.

[84] Bundesgesetz über den unlauteren Wettbewerb (30 September 1943).

[85] S. Buser Frères & Co. v. Thommen's Uhrenfabriken A. G., BGE 57, II, 457.

products wherever the method used by the imitator in introducing his product to the public runs afoul of the basic requirements of honesty and good faith in trade; there is no indication in the Swiss decision that the imitator's liability in such cases can be avoided merely by the use of his name alone.

In Italy, too,[86] the courts now recognize the principle of free imitation of any product or features thereof not protected by special statute but, based on Article 10 *bis* of the Paris Convention as revised in London in 1934, a distinction is made between what our own courts would call "functional" and "nonfunctional" features. Slavish copying of the latter is generally considered an act of unfair competition under Italian law.[87]

How has slavish imitation and the making of "Chinese copies" fared under our own law of unfair competition? Has the broad policy of the *International News* case[88] been carried out in this important field so that industrial designers in the United States may rely on effective protection against unfair competition even in the absence of special legislation? The answer, as is only too well known today, is clearly in the negative. There is no need or room here to review in detail the hitherto unhappy plight of the industrial designer in the United States. Suffice it to mention that as of this moment, the prevailing philosophy in the United States is expressed in these words of Mr. Justice Brandeis in the *Shredded Wheat* case:[89]

"Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested."

While the doctrine of the *International News* case has been followed in relatively few enlightened lower court decisions,[90] it was soon declared to be inapplicable in the absence of special legislation in case of textile designs,[91] and, since then, in almost all situations involving ornamental

[86] Blum, *op. cit.* note 81 at p. 63, *et seq.*

[87] Thus it was stated in Wax & Vitale v. Martino (July 1936) (Rivista 1936, S. 31):

"A nonpatented product may lawfully be imitated with regard to its internal elements which are indispensable for its reproduction; however, its external features may not be slavishly imitated."

[88] See note 16 *supra.*

[89] Kellogg Co. v. National Biscuit Co., 305 U.S. 111, at 122 (1933).

[90] Metropolitan Opera Ass'n. v. Wagner-Nichols Recorder Corp., note 19 *supra*, and most recently, Haeger Potteries v. Gilner Potteries, 123 F. Supp. 261 (S.D. Calif. C.D. 1954).

[91] Cheney Bros. v. Doris Silk Corp., 35 F. 2d 279 (2d Cir. 1929), cert. den. 281 U.S. 728 (1930).

or industrial designs which fall outside the protection of the patent or design patent statutes. The gradual elimination of design piracy of all types from the law of unfair competition has been traced and illustrated elsewhere[92] and will not be repeated here, but the result of a long line of recent cases has been to leave industrial designers and those who pay for their services virtually without any legal protection whatsoever.[93] This gap in the law of unfair competition (in the absence of proof of a secondary meaning which can almost never be established, even though, as in the *General Time* case, millions of dollars worth of clocks with the design may have been sold) is even more disconcerting if it is considered that as a result of false historical analogies, design patents in our country are subjected to the same tests as are mechanical patents, including the same rigid test of "invention." We know that less than ten percent of all design patents, although issued only after thorough preexamination, are held valid by the courts and that it has become almost axiomatic immediately to discard any allegation of unfair competition with the convenient excuse that, contrary to Continental practice, such protection may, as a practical matter, be afforded only in cases of obvious passing off, which can be readily avoided in the United States by the mere device of adding the defendant's name to the product.[94]

It may be of some comfort, to be sure, to learn from the Supreme Court's widely discussed recent decision in *Mazer v. Stein*[95] that, under the Rules of the Copyright Office as revised in 1949,[96] the "artistic features" of certain works of the applied arts (i.e., jewelry, glassware, etc.) may now be registered in the Copyright Office, and that a work of art, such as a sculpture, does not lose its protection under the Copyright Act by subsequent embodiment as a lamp base in an article of commercial mass production. Therefore, as a result, the Copyright Office will now register the artistic features of wall paper, textiles, etc., provided they are separately identifiable as such, but the vast majority of models and works of the applied arts, as such, will remain outside such protection. More-

[92] Gotshal and Lief, The Pirates Will Get You! (New York 1945); Derenberg, "Copyright No-Man's Land: Fringe Rights in Literary and Artistic Property," 1953 Copyright Problems Analyzed (Commerce Clearing House Inc. 1953), reprinted 35 J. Pat. Off. Soc. 627, 690, 770, (1953).

[93] Chas. D. Briddell, Inc. v. Alglobe Trading Corp., 194 F. 2d 416 (2d Cir. 1952); Pagliero v. Wallace China Co., Ltd., 198 F. 2d 339 (9th Cir. 1952), General Time Instruments Corp. v. The United States Time Corporation, 165 F. 2d 853 (2d Cir. 1948), and many others.

[94] Chas. D. Briddell, Inc. v. Alglobe Trading Corp., note 93 *supra*.

[95] 74 S. Ct. 460 (Mar. 8, 1954).

[96] 37 CFR, 1949, Sec. 202.8, "Works of Art (Class G)-(a)."

over, there appears to be a consensus in this country that neither the present design patent statute nor the Copyright Act provides a workable measure of protection for artistic designs (the Copyright Act, where applicable, may even result in overprotection by providing a 56-year period of protection for a model or design which actually may require such protection for only an initial period of, say, three to five years). What is more interesting for the immediate purpose of this study is the now acknowledged self-imposed reluctance of our equity courts to apply and enforce the same basic principles of fair competition which are observed in many foreign countries simply on the bases of such general statutory provisions as Articles 1382 and 1383 of the French *Code Civil*. While some forward-looking decisions have characterized unfair competition as embracing any conduct which "shocks judicial sensibilities,"[97] others in more recent years have gone so far as to say that "While plagiarism in any form is to be deplored and certainly not condoned or encouraged, we are concerned here not with one's sense of fairness, but with the law."[98] And while it may be true that our fear to create or extend monopolies, which was once referred to by Judge Jerome Frank as "monopoly-phobia,"[99] may warrant legislative and judicial reluctance unduly to expand an author's or inventor's rights, we should recognize at the same time that fundamental principles of fairness and business ethics should not be readily sacrificed but should be considered an inherent part of the general law of unfair competition.[100] As was said by the late Judge Shientag in a design piracy case,[101] "Even in the present state of the law the piracy of styles is not entirely without the pale of the Seventh Commandment."

[97] In Margarete Steiff v. Bing, 215 F. 204 (S.D. N.Y. 1914), Judge Hough said: " 'Unfair competition' consists in selling goods by means which shock judicial sensibilities; and the Second Circuit has long been very sensitive."

[98] Stein v. Benederet, 109 F. Supp. 364 (E.D. Mich. 1952), at p. 366.

[99] In Eastern Wine Corp. v. Winslow-Warren, Ltd., Inc., 137 F. 2d 955 (2d Cir. 1943), cert. den. 64 S. Ct. 65 (1943), Judge Frank said at p. 958: "There are some persons, infected with monopoly-phobia, who shudder in the presence of any monopoly. But the common law has never suffered from such a neurosis. There has seldom been a society in which there have not been some monopolies, i.e., special privileges."

[100] In denying protection against unfair competition in cases of this type, our courts have often quoted Judge Learned Hand's statement in one of the early "Shredded Wheat" cases, involving the imitation of the shape of the product: "Under the guise of protecting against unfair competition, we must be jealous not to create perpetual monopolies." Shredded Wheat Co. v. Humphrey Cornell Co., 250 Fed. 960 at 964 (2d Cir. 1918). It would seem regrettable, however, if the philosophy expressed in this statement were extended to such a point that it actually becomes a windfall for unfair competitors.

[101] Margolis v. National Bellas Hess Co., Inc., 249 N.Y.S. 175 (N.Y.S. Ct. 1931).

Conclusion

Having attempted to consult the experience of some European countries in connection with an evaluation of our own problems of unfair trade, we have seen that from the very start, this branch of the law was permitted to develop in Europe as an independent body of general law to which special remedies, both civil and criminal, were added for the protection of trade-marks, designs, and other artistic or industrial productions in implementation of the patent and copyright laws, while in the United States the doctrine of unfair competition had a slow start indeed, having been originally applied only in so-called "cases analogous to trademark infringement."[102] But quite apart from that, our brief review of some of the major types of conduct which form so important a part in the Continental theory of unfair competition, has emphasized the fact that our equity courts deemed themselves hampered by the existence of certain historic maxims which for a long time and to some extent even today have served as stumbling blocks in the formulation of a more effective body of private law against all forms of unfair trade. This, it has been shown, was true of such practices as, for instance, disparagement of a competitor, false and deceptive advertising, and misappropriation as well as slavish imitation. And even where in the past our courts dared—even before the *International News* case—to condemn instances of outright misappropriation in the absence of passing off, there has recently appeared a retrogressive trend.[103]

[102] See notes 9 and 10, *supra*.

[103] Suffice it to refer to the memorable Fonotipia case, in which an equity court granted relief against the making of a phonograph record from another record, although the record itself, under the then and now prevailing Copyright Act, was not capable of copyright protection and although no elements of passing off were present. The court there said: (Fonotipia Limited et al. v. Bradley, Victor Talking Machine Co. v. same, 171 Fed. 951 (E.D. N.Y. 1909), at 962):

"The jurisdiction of a court of equity has always been invoked to prevent the continuance of acts of injury to property and to personal rights generally, where the law had not provided a specific legal remedy, and it would seem that the appropriation of what has come to be recognized as property rights or incorporeal interests in material objects, out of which pecuniary profits can fairly be secured, may properly, in certain kinds of cases, be protected by legislation; but such intangible or abstract property rights would seem to have claims upon the protection of equity, where the ground for legislation is uncertain or difficult of determination, and where the principles of equity plainly apply."

This would be undoubtedly the type of reasoning which a French, German, or Swiss court would have applied in a case of this kind. However, only two years ago the Court of Appeals for the Second Circuit, G. Ricordi & Co. v. Haendler, 194 F. 914 (2d Cir. 1952) held that the making of a photographic copy of a work, the text of which was in the public domain, but which embodied some especially beautiful typographical work, was not actionable because the special typography which had been used to embellish and distinguish the book was not capable of separate legal protection. In effect overruling the Fonotipia case, the court concluded:

There is still another important factor to be taken into account in reviewing the present status of our law of unfair competition in the light of foreign experiences. The famous Supreme Court decision in *Erie v. Tompkins*,[104] no matter how beneficial its results may have been in other fields of the law, has served greatly to retard the development of the law of unfair competition in this country, at least in areas such as Illinois, in which the doctrine of unfair competition had never found much recognition outside and beyond the traditional action for passing off. As recently as 1923, the Appelate Court of Illinois, in refusing to apply the rule of the *International News* case, said:[105]

"The 'palming off' rule is expressed in a positive, concrete form which will not admit of 'broadening' or 'widening' by any proper judicial process. It is rigid and inelastic. . . . According to the view we have taken, the Supreme Court of the United States holds that the 'palming off' rule is not the only ground of equitable relief in unfair competition, and the Supreme Court of this State holds it is the only rule of decision."

Thus, another severe blow was dealt the doctrine of unfair competition, particularly in jurisdictions such as Illinois, which are unwilling even to recognize the existence of this branch of the law outside the narrow limits of passing off.[106]

"We do not mean that the defendant could under no circumstances be guilty of 'unfair competition' in his use of the 'work'; but it would have to be by some conduct other than copying it. Since he confined himself to that and gave notice that it was his product, the Copyright Act protected him. This reasoning applies as well to any rights which may be supposed to flow from the doctrine of International News Service v. Associated Press, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211, although, as we have several times declared, that decision is to be strictly confined to the facts then at bar. So far as Fonotipia Limited v. Bradley, C. C., 171 F. 951 may be thought to conflict with what we are holding, it is overruled." (*Ibid.* at 916)

A ray of hope for a return to the International News doctrine, even by the Court of Appeals of the Second Circuit, may, however, be found in Judge Clark's recent opinion in Hartford Charga-Plate Associates, Inc. v. Youth Centre-Cinderella Stores, Inc., 215 F. 2d 668 (2d 668 (2d Cir. 1954). Although plaintiff was not held entitled to relief, the court there said, with regard to the International News case and its own previous decision in the Ricordi case (*supra*):

"In fact, as freely conceded, defendant was at liberty to duplicate and use a system like plaintiff's; the only attempted ban was by way of servitude upon a use otherwise freely possible of plaintiff's plates in defendant's addresser. We do not think the precedent will therefore bear the burden thus laid upon it, even if we do not follow the repeated trend in this court, noted as lately as G. Ricordi & Co. v. Haendler, 2 Cir., 194 F. 2d 916, 92 USPQ 340, to confine that decision strictly to the facts then at bar."

[104] 304 U.S. 64 (1938).

[105] Stevens-Davis Co. v. Mather & Co., 230 Ill. App. 45 (1st Dist. 1923), at p. 65. *Cf.*, with regard to this case, Rissman, "The Law of Unfair Competition in Illinois," 1950 U. of Ill. L. Forum (Winter, 1950) 675.

[106] This has been strikingly pointed out in a leading law review article by Sergei S. Zlinkoff, "Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition,"

Where then should we turn for a possible solution of our difficulties? At least four possibilities suggest themselves. Most interesting, but certainly most roundabout, is the theory advanced by the late Edward J. Rogers in 1949,[107] and earlier in his preface to *The New Trade-Mark Manual*,[108] that the answer lies in Section 44 of the Trade-Mark Act of 1946 and more particularly in Section 44(i). The latter provision unobtrusively states that all benefits to which foreigners may be entitled in the United States under the international conventions to which we have adhered, should be equally available to United States citizens. Thus, it is argued, a federal law of unfair competition has been created which will make a wide category of unfair trade practices actionable in the federal courts on the ground that they should be considered part and parcel of our own substantive law. This has been the origin of the now famous Stauffer doctrine,[109] named after a case in which the Court of Appeals for the Ninth Circuit expressly adopted this theory, thereby eliminating in effect the *Erie v. Tompkins* doctrine[110] with regard to all those many types of unfair competition which have found condemnation in either the revised Paris Convention of 1883 or the Inter-American Convention of 1929. However, it seems that—thus far at least—other appellate federal tribunals have been disinclined to expand our domestic unfair competition law in this ingenious but rather indirect fashion. The Court of Appeals for the Second Circuit has expressly refused to follow the doctrine at least in its procedural aspects,[111] and, more recently, the Court of Appeals for the Third Circuit likewise announced its dis-

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42 Col. L. Rev. (June, 1942) 952, as well as in a challenging paper by the late Mr. Rogers on "Unfair Competition," 35 T. M. Rep. (Nov. 1945) 126. Mr. Rogers wrote:

"But then came Erie Railway v. Tompkins, 304 U. S. 64, and there was chaos. There were 48 different sovereignties the decisions of whose courts were the law. The body of federal decisions which had been 50 years evolving was not binding either on the state or federal courts. No one knows what the law is. Theoretically, what the federal courts are required to apply is the law of the state where they might sit. And it was frequently found that there were no applicable state decisions, or that the decisions of the states comprising the same circuit were not uniform. It may take fifty years to get a body of decisional law in the State of Illinois comparable to the one already developed in the Circuit Court of Appeals for the Seventh Circuit."

Mr. Rogers went so far as to prepare a model unfair trade act, which is printed as an appendix to his article, at p. 133.

[107] "The Lanham Act and the Social Function of Trade-Marks," 14 Law & Contemp. Probs. 173 (Spring 1949).

[108] Robert, 1947.

[109] Stauffer v. Exley, 184 F. 2d 962 (9th Cir. 1950).

[110] *Supra*, note 104.

[111] American Automobile Ass'n. v. Spiegel, 205 F. 2d 771 (2d Cir. 1953), cert. den. 74 Sup. Ct. 138 (1953).

approval of the doctrine.[112] Unless the United States Supreme Court should eventually express itself in favor of the *Stauffer* doctrine, we must conclude that it is at least very doubtful whether the Trade-Mark Act of 1946 has succeeded in either creating or enlarging a federal law of unfair competition outside the previously discussed Section 43, which now gives a federal cause of action in cases involving false designations of origin or false descriptions.[113]

Nor has the second possible solution offered by Professor Bunn of the Wisconsin Law School,[114] which considers Section 5 of the Federal Trade Commission Act as a possible basis of a private federal law of unfair competition, found any general acceptance or support. It was Professor Bunn's suggestion that the general clause of Section 5, broadly authorizing the Federal Trade Commission to "prosecute unfair acts and practices," might be considered a source of federal unfair competition law even for purposes of private litigation.

A third solution might be the enactment of uniform state legislation supplemented by a federal act under the Commerce Clause of the Constitution, which would specifically outlaw all those practices enumerated as types of unfair competition in the international conventions and which would, in addition, embody the kind of general clause against unfair trade practices which is found in Article 10 *bis* of the Paris Convention and Article 20 of the Inter-American Convention. It is particularly interesting to note in this regard that at least one of the 48 states has written a general clause against unfair competition into its statutory law. Section 3369 of the Civil Code of California provides in part that:

"Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction. . . . unfair competition shall mean and include unfair or fraudulent business practice and unfair, untrue or misleading advertising. . . ,[115]

Fourth, and finally, however, it might well be asked whether, in the light of the European experience, our courts—both state and federal—

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[112] L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., note 68 *supra*.

[113] See p. 20 *et seq.*, *supra*.

[114] "The National Law of Unfair Competition," 62 Harv. L. Rev. (1949) 987.

[115] Partly because of this broad statutory provision, a California district court recently granted extremely liberal and effective protection against slavish copying of pottery and ceramic products which were not protected by design patent or copyright. In Haeger Potteries v. Gilner Potteries, *supra*, note 90, the court said (at p. 268):

"Even though each feature composing the article be open to public use, if the ensemble created by the imitator produces an object which misleads the public to the prior user's detriment, there arises under California law a cause of action for unfair competition."

might not be in a position to establish a workable and effective body of private law against all types of unfair conduct in business without the help of any new legislation, but merely in the exercise of sound discretion and established rules of fair play? While it is undoubtedly true, as stated by Mr. Justice Brandeis in his famous dissent in the *International News* case, that the "noblest of human productions,—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communications to others, free as the air to common use,"[116] it is equally true that there are ways and means, even in a free competitive economy, which, being generally considered unfair and unethical and—in the European sense—*contra bonos mores*, should be considered illegal at the same time.[117] If this paper has demonstrated that in many situations of this kind, the courts in foreign countries have given private relief without any resulting harm, then—according to Professor Chafee—we may be encouraged "to be bold." "Foreign experience," Professor Chafee observed, "is like a map of the territory we are still exploring." Perhaps continued exploration along the lines we have outlined may eventually result not only in a much needed expansion of our own law of unfair competition but, at the same time, furnish a more enduring basis for effective international protection of industrial and artistic property.

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[116] Note 16, *supra*, at p. 250.

[117] As was said by the Supreme Court of California as far back as 1895 (Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 145 (1895)):

"... the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him."

Or, as stated even more plainly by the Court of Appeals for the Seventh Circuit in National Telegraph News Co. v. Western Union (119 Fed. 294 (7th Cir. 1902), at 299):

"Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. . . . It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appropriate protection. Otherwise courts of equity would be unequal to their supposed great purposes; and every day as business life grows more complicated, such inadequacy would be increasingly felt. . . . Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent."

In concluding his study on unfair competition in 1940, ("Unfair Competition," 53 Harv. L. Rev. (1940) 1289) Professor Zechariah Chafee said:

"A court may find it very helpful to consult the experience of Germany and Austria in their more enlightened days, and of France and Switzerland. Their problems of unfair trade are much the same as ours. If in a novel situation we find that their courts have given private relief without any resulting harm, this encourages us to be bold."

GEORGES RENÉ DELAUME

Marital Property and American-French Conflict of Laws

1. SINCE THE EARLY DAYS OF RELATIONS between the United States and France, conflicts of laws involving marital property have presented difficulty, chiefly due to lack of adequate information. In this as in other areas of American-French private international law,[1] failure to reach complete reciprocal understanding is fostered by the absence of international judicial assistance,[2] together with unsatisfactory methods of proving foreign law.[3] This has been dramatically revealed in a recent case which has been tried both in France and in the United States.[4]

2. In both countries, marital property law determines the interests in the property of one spouse, owned at the time of the marriage or acquired later, which by reason of the marital relation, may vest in the other spouse. Again, where the system of community property prevails, as in France and certain states of the Union, marital property law controls the interests of the spouses in their community property. The same branch of law determines the powers of management and alienation of the spouses with respect to both separate and community property.[5]

However, several issues which are characterized in France as issues of marital property are characterized differently in the United States. These problems of characterization are not eased by misleading similarities of

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[1] See G. R. Delaume, American-French Private International Law, Bilateral Studies in Private International Law, No. 2, Columbia University (1953), hereinafter American-French P.I.L.

[2] See H. Leroy Jones, "International Judicial Assistance, Procedural Chaos and a Program for Reform," 62 Yale L.J. (1953) 515.

[3] See A. Nussbaum, "Problem of Proving Foreign Law," 50 Yale L. J. (1941) 1018; "Proving the Law of Foreign Countries," 3 Am. J. Comp. L. (1954) 60; Principles of Private International Law, (1943) 248 *et seq.*; Niboyet, 3 Traité de Droit International Privé Français (1944) (hereinafter Traité) §§971 *et seq.*, 1063 *et seq.*; Batiffol, Traité Elémentaire de Droit International Privé (1949), §332 *et seq.*; David, Traité Elémentaire de Droit Civil Comparé (1950) 49 *et seq.*

[4] Dulles v. Dulles, 369 Pa. 101, 85 A. 2d 134 (1952); Cass. May 5, 1953, Dulles v. Dulles, D. 1953, 479. See *infra*, paragraph 9.

[5] See generally 1 Rabel, The Conflict of Laws, A Comparative Study (1945) (hereinafter Rabel), 331 *et seq.*

legal terminology, such as "separate property" or "community property," which may have different connotations in the states of the Union respectively and in France.[6]

3. Some of these difficulties are obviated when the parties determine their property rights in an antenuptial agreement or, in the United States but not in France, in a property settlement made after the marriage, especially when the agreement contains a stipulation on the applicable law. Antenuptial agreements are more frequently made in France than in the United States, but they still affect a minority of married couples. Furthermore, it may happen that, at the time the agreement is made, the parties do not contemplate any future removal to a foreign country or any acquisition of property there, so that the agreement does not help to solve the conflict of laws problems which may subsequently arise. Again, when citizens of one country marry in the territory of the other, they rarely enter into a specific property agreement, either because they own little property at the time or because they lack legal advice. Issues of marital property in American-French conflict of laws, therefore, are complicated not only by the difficulty of knowing the provisions of the foreign law involved, but also by the tendency of the parties to ignore the property incidents of the marriage relation.

4. Except in case there is an antenuptial agreement including an express stipulation on the applicable law, and the agreement is specific enough to cover removal to a foreign country or the acquisition of property there, fundamental differences exist between the American and the French rules of conflict of laws.

The basic distinction made in the United States between movable and immovable property is not accepted in France, at least not to the same extent. In the latter country, marital property relations are considered as a unity, or, under French terminology, as a universality, governed as such by a single law. This law, "the" law of the matrimonial regime, generally applies to the relationship from its inception to its dissolution, wherever the property is located and regardless of the modifications which may occur in the status of the spouses or the *situs* of their property, another fundamental difference between the French and the American rules. Although these general rules require qualification in several respects, they can be considered as sufficiently characteristic of each system of law, French or American, to lead the way to a further study of the law governing marital property (1) during coverture in the

[6] See the interesting developments made by H. Marsh, Jr., Marital Property in Conflict of Laws, (1952) 11 *et seq.*

absence of any change in the status of the parties, and (2) when there is a change in the status of the parties or upon the termination of the relationship.

I. The Law Governing Marital Property During Coverture in the Absence of Any Change in the Status of the Parties

5. Both the French and the American rules of conflict of laws vary according as the parties have married with or without an antenuptial agreement (in the French terminology, a marriage contract), a distinction which may be followed for the purpose of this comparative study.

6. *A. What law is applicable when the parties have made an antenuptial agreement?* In France, capacity to enter into an antenuptial agreement is governed by the national law of each prospective spouse at the time of contracting.[7] In the United States, capacity to make an agreement depends upon the *lex loci contractus*, which often coincides with the law of the domicile, or the *lex rei sitae* insofar as the creation of interests in land is concerned.[8]

Under French law, the formal validity of antenuptial agreements is governed by the *lex loci actus*.[9] Although this rule also generally obtains in the United States,[10] it is limited by the rule that the formal validity of contracts affecting land and interests therein is governed by the *lex rei*

[7] No case in point has been found. See, however, G. R. Delaume, American-French P.I.L., 46 *et seq.*, 50. Under the French rule, the national law is applicable either to capacity to contract or to capacity to marry, and there is normally no interest in distinguishing the two questions. However, especially with regard to minors who, although they cannot enter into an ordinary contract, are exceptionally permitted to make an antenuptial agreement, the problem is solved by extending to it the rules governing capacity to marry rather than those relating to capacity to contract, according to the maxim "*habilis ad nuptias, habilis ad pacta nuptialia.*" This distinction, important under French municipal law, has little bearing on conflict of laws since the national law of the parties applies in either case. (See however, 5 Niboyet, Traité, (1948) 401–402).

[8] See e.g. Goodrich, Conflict of Laws, 3rd ed. (1949) (hereinafter Conflict) 312 *et seq.*, 390 *et seq.*, 459; R. Neuner, "Marital Property and the Conflict of Laws," 5 La. L. Rev. (1943) 167, 183.

[9] In France, the question has been debated whether the requirement of French law that the agreement be made in solemn form (*en forme authentique*, that is by a public act before a French notary or a French consular officer if executed abroad) was formal or substantial in character. This was of course a question of qualification. The qualification "form" now prevails in France. See 4 Répertoire de Droit International (de Lapradelle et Niboyet, hereinafter Rep. Dr. Int.) 191–192.

[10] See, e.g. Decouche v. Savetier, 3 Johns Ch. 190, 8 Am. Dec. 478 (N.Y. 1817); Crosby v. Berger, 3 Edw. Ch. 538 (N.Y. 1842) modified on other grounds 4 Ch. Sent. 63; Le Prince v. Guillemot, 18 S.C. Eq. (1 Rich) 187 (1843); Strebler v. Wolf, 273 N.Y.S. 653, 152 Misc. 859 (1934); all cases concerning the validity of antenuptial agreements made in France.

sitae.[11] Another difference between the French and the American rules is that, whereas under the former the application of the *lex loci actus* is optional and the parties are free to comply with the formalities required by the proper law of the agreement,[12] the American rule has sometimes been construed as mandatory.[13] Also, it must be noted that, whereas French consular officers in the United States have authority to draw up antenuptial agreements made by French citizens,[14] American consular officers in France do not enjoy the same prerogative.

Another problem concerns the recording and publication of antenuptial agreements. The pertinent French rule is that only agreements made in France must be there recorded.[15] Therefore, no recordation or publication in France is required of agreements made in the United States, except when the agreement is drawn up and the marriage is performed by a French consular officer.[16] Another exception is that spouses, either French or foreign, who undertake business operations in France after the marriage and have declared in their agreement that there shall be no community property between them, must record their agreement in the French Commercial Register,[17] a measure intended to protect local credi-

[11] See e.g. Goodrich, Conflict, 319–320.

[12] See e.g. Article 59, para. 3, of the Draft of a Codification of French Private International Law (as translated) in K. Nadelmann and A. von Mehren, "Codification of French Conflicts Law" (hereinafter "Codification"), 1 Am. J. Comp. L. (1952) 404, 424.

[13] See e.g. Goodrich, Conflict, 315 *et seq.* The case of Le Breton v. Miles, 8 Paige 261 (N.Y. 1840) has no bearing on this question. In that instance, two French citizens made in New York an antenuptial agreement which did not satisfy the formal requisites of the French Civil Code, the law of their intended domicil and also the proper law of their agreement. This was, nevertheless, held valid, apparently under the law of New York. This case seems, therefore, a mere illustration of the American rule that the *lex loci actus* governs matters of formal validity.

[14] American-French Consular Convention of February 23, 1853 (10 Stat. 992; 18 Stat. (pt. 2) 249–253; U. S. Treaty Series No. 92), Article VI. See also Article 37, para. 3, of the Draft of a Codification of French Private International Law (as translated) in K. Nadelmann and A. von Mehren, "Codification," 1 Am. J. Comp. L. (1952) 404, 422.

[15] Articles 75, 76, 1391 (as amended by a law of July 10, 1850) Fr. Civ. Code; Articles 67 *et seq.* (as amended by *décret* of August 9, 1953) Fr. Comm. Code.

[16] See 4 Niboyet, Traité, (1947) 40 *et seq.*; 61 *Ibid.*, (1949) 208–209.

[17] Articles 67 *et seq.* (as amended) Fr. Comm. Code. See e.g. Cass. Civ. February 27, 1883, Russel v. Guitton, S. 1884.1.185. In that case, the court held that a woman married in Brazil whose property was governed by the Brazilian "dotal" regime was compelled to comply with the French law upon undertaking business operations in France. Rabel's statement that "French courts when they actually recognize that foreign law governs the property regime, consider it the duty of anyone dealing with the husband or wife to inform himself about the legal background" (1 *Rabel*, p. 371), is, therefore, too broad and should be read only in connection with the above remarks.

tors. An old American case, probably obsolete today, deals with this problem.[18]

7. With regard to the essential validity and construction of antenuptial agreements, the law normally applicable is that intended by the parties, subject to the requirements of the *lex rei sitae* in the case of immovable property.[19] Save for the latter requirements and also those of public policy,[20] effect is normally to be given to agreements referring to the *lex loci contractus*,[21] or the law of the intended domicil of the spouses,[22] or the proper law of the contract.[23]

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[18] In Le Prince v. Guillemot, 18 S.C. Eq. (I Rich.) 187 (1843), a South Carolina statute prescribed the registration of antenuptial agreements for the protection of local creditors. The question at issue was whether the daughter of a bankrupt could claim, under an antenuptial agreement made in France, the payment of her dowry against the creditors of her father even though the agreement had never been published by registration in South Carolina. The Supreme Court of the state allowed the claim, as not falling within the scope of the statute. The Court found that the latter was limited to controversies between the spouses and their individual creditors and did not apply where the dispute was between one of the spouses and the creditors of a parent. This case is, therefore, not conclusive on the solution that would have prevailed if the controversy had been squarely within the scope of the statute.

[19] See e.g. Strebler v. Wolf, 152 Misc. 859, 273 N.Y.S. 653 (1934); Goodrich, Conflict, 390 *et seq.*

[20] See dicta in Murphy v. Murphy, 5 Martin 83, 12 Am. Dec. 475 (La. 1817); Crosby v. Berger, 3 Edw. Ch. 538 (N.Y. 1842), modified on other grounds 4 Ch. Sent. 63; De Pierre v. Thorn, 4 Bosw. 266 (N.Y. 1859); Richardson v. De Giverville, 107 Mo. 422, 17 S.W. 974 (1891). See also French Civil Code, Articles 1388, 1389. A trust *inter vivos* is not necessarily contrary to French public policy even if it modifies the property rights or the power of administration or disposition of a married woman over her personal property. See Cass. April 20, 1869, Ferguson v. Guidon, D.P. 1870.1.99; Trib. Civ. Seine December 10, 1880, Enregistrement v. Palikao, Clunet 1881, 435; August 6, 1888, Royme v. Linton, Clunet 1889, 635; December 22, 1926, Beer Ltd. v. Betts Brown, Clunet 1928, 122; but see Paris April 18, 1929, Soc. Beer v. Humphries, Rev. 1935, 149; all cases involving English trusts. See P. Lepaulle, Traité Théorique et Pratique des Trusts, (1932) 76; A. Nussbaum, "Sociological and Comparative Aspects of the Trust," 38 Col. L. Rev. (1938) 408.

[21] See Murphy v. Murphy, 5 Martin 83, 12 Am. Dec. 475 (La. 1817); Decouche v. Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478 (N.Y. 1817); Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277 (1858); Richardson v. De Giverville, 107 Mo. 422, 17 S.W. 974 (1891). In all these cases the *lex loci contractus* was also that of the matrimonial domicil.

[22] See Le Breton v. Miles, 8 Paige 261 (N.Y. 1840).

[23] In this respect, an interesting question arises whether the parties may, by selecting a foreign law, incorporate a foreign regime into their agreement. Such an incorporation is possible under French law (4 Rep. Dr. Int., 190). In the United States, it was held in Bourcier v. Lanusse (3 Mart. (O.S.) 581 (La. 1815)), an old Louisiana case, that under the law of the *Partidas* then in force in Louisiana, an antenuptial agreement made in the latter state could contain no stipulation that the Custom of Paris should govern the property rights of the parties. It is doubtful, however, whether this case would be followed today (See J. E. Parker, "Free Will in Conflict of Laws," 6 Tulane L. Rev. (1932) 454, 467 notes 82 and 83). In Le Breton v. Miles (cited in the preceding note), there was a stipulation in an agreement made in New York by two French citizens that the French law of their intended domicil should apply. The

8. In the absence of an express declaration on the applicable law, the law which seems to be most consonant with a fair interpretation of the parties' intention will govern. Thus, the *lex loci contractus* has been held applicable, especially when it coincides with the law of the matrimonial domicil.[24] The forms in which the agreement has been drawn up may also be a controlling factor, particularly when the agreement has been drawn up by a consular officer. Ordinarily, scant attention is paid to the place where the marriage has been celebrated,[25] whereas much stress is laid, especially in the United States, upon the *situs* of the property owned by the parties at the time of the agreement. For example, in *Richardson v. De Giverville*,[26] a wife had sold, without her husband's authorization, some land that she owned in Missouri prior to the marriage celebrated in France, the place of the matrimonial domicil. An antenuptial agreement executed in France provided expressly that the property regime should be the community of acquests (*communauté d'acquêts*) regulated by articles 1498 and 1499 of the French Civil Code. The question at issue was whether the wife's authority to sell her land in Missouri was to be determined by the law of that state or by French law. Although there was little interest, in this particular instance, in determining the applicable law since both agreed that the wife had no such authority, the court based its decision upon the provisions of the law of Missouri, the *lex rei sitae*, rather than on those of French law, the proper law of the agreement.[27]

The case of *Ordronaux v. Rey*,[28] concerns the effect of an agreement upon subsequently acquired property. By an antenuptial agreement executed in France, the place of the matrimonial domicil, the wife put one third

parties never removed to France but settled permanently in New York. It was held that, so far at least as personal property was concerned, French law governed the relationship.

[24] See Crosby v. Berger, 3 Edw. Ch. 538 (N.Y. 1842); Ordronaux v. Rey, 2 Sandf. ch. 33 (1844); Le Prince v. Guillemot, 18 S.C. Eq. (1 Rich) 187 (1843); De Pierre v. Thorn, 4 Bosw. 266 (N.Y. 1859); Strebler v. Wolf, 152 Misc. 859, 273 N.Y. 653 (1934) (dictum). No French case in point has been found, but at least one reported French case is consistent with the American decisions. See Paris, December 10, 1901, De Santa-Christina v. Del Drago, D. 1905. 2.128, concerning an antenuptial agreement made in Italy by a citizen of the Papal state and a Spanish woman. The court held that the Italian law governed the validity and construction of the agreement.

[25] See, however, a dictum in Murphy v. Murphy, 5 Martin 83, 12 Am. Dec. 475, 476 (La. 1817). See also Article 38 of the Draft of a Codification of French Private International Law (as translated) in K. Nadelmann and A. von Mehren, "Codification," 1 Am. J. Comp. L. (1952) 404, 422.

[26] 107 Mo. 422, 17 S.W. 974 (1891).

[27] See also Heine v. Mechanics' and Traders' Insurance Co., 45 La. Ann. 770, 13 So. 1 (1893).

[28] 2 Sandf. Ch. 33 (N.Y. 1844).

of her property into the community and retained the residue as separate property. Subsequently, the parties removed to New York where the husband took and used for business purposes the whole residue of his wife's property. At his death, he owned immovable property in New York. The wife claimed against his creditors that the French agreement operated as a lien (*hypothèque*) upon the decedent's estate and that she was entitled to priority of payment of her demands arising under the agreement. It was held that, although the claimant should have in New York the same right as a creditor that she would have under the French agreement, yet she could not claim over the real estate situated in New York a lien unknown to the law of that state.[29]

On the French side, the proper law of the contract rather than the *lex rei sitae* governs the *authority* of the parties to administer and dispose of their real property. Once this authority is established, the national law of the parties must be consulted to determine whether the parties have *capacity* to enter into the particular transaction involved. A decision similar to that of *Richardson v. De Giverville*, is, therefore, unlikely to be found in France.[30] However, there are instances in which the proper law of the agreement or the national law of the parties must yield to the French law of the *situs*.[31] Thus, several French cases have denied effect in France to foreign restraints on the alienation of French immovables, similar, although distinguishable from, those created under a French "dotal" regime,[32] and the question of the effect in France of a foreign trust is as yet far from being settled.[33]

9. *B. What law is applicable when no antenuptial agreement has been*

[29] See also De Pierre v. Thorn., 4 Bosw., 266 (N.Y. 1859).

[30] The only decision which has been found concerns a case where renvoi from the American to the French law of the situs was accepted by a French court. See Trib. Civ. Pau July 28, 1904, L... v. G..., M.. and G..., M..., L..., v. P.., Clunet 1905, 194. See also *infra*, paragraph 13.

[31] For example, article 2128 Fr. Civ. Code provides that contracts made in a foreign country cannot have the force of a *hypothèque* in France, and it has been held on several occasions that, except for treaty provisions to the contrary, an alien woman could not claim any lien or priority over the immovables owned by her husband in France. (See e.g. Charron, "L'Hypothèque Légale de la Femme Etrangère," Nouv. Rev. 1937, 29 *et seq.*). Note that in this instance, French courts deal with the problem as one concerning the rights of aliens in France, rather than a problem of conflict of laws.

[32] See cases cited in 4 Rep. Dr. Int., 195–196.

[33] No case involving real property in France has been found. With regard to personal property, see Trib. Civ. Seine August 8, 1888; Royle v. Linton, Clunet 1889, 635; and May 16, 1906; Sohège, Clunet 1910, 1229, granting effect in France to English trusts made by an English and an American woman, respectively, prior to marriage. See, however, Trib. Civ. Seine, February 23, 1927, Doeuillet v. Dagmar Betts Brown, Rev. 1927, 263, and Paris April 18, 1929, Soc. Beer v. Humphries, Rev. 1935, 149, denying effect in France to trusts created in England, on the ground of public policy.

made? For historical reasons, French and American law approach this question from different angles. Following the theory developed by Dumoulin,[34] French courts assimilate cases where there is no antenuptial agreement and where the agreement does not specify the applicable law. In both types of cases, marital property, *either personal or real*, is said to be governed by the law impliedly intended by the parties.[35] According to circumstances, French courts have held that the presumed intention of the parties was to refer to the law of the matrimonial domicil,[36] or their national law.[37] These are ordinarily controlling, although by no means exclusive, factors. Other factors are the place and mode of celebration of the marriage,[38] the *situs* of property, especially real property, owned by the parties at the time of the marriage or acquired thereafter,[39] written statements made by the parties, or changes of domicil subsequent to the marriage.[40]

These decisions demonstrate the thoroughness with which French courts try to ascertain the intention of the parties as to the applicable law.[41] What they also reveal is the fallacy of the premises on which the argumentation is based. If, at the time of the marriage, the parties had had

[34] On the historical background of this theory, see G. R. Delaume, Les Conflits de Lois à la Veille du Code Civil (1947) (hereinafter Conflits), 247 *et seq.*

[35] Hence the term "implied contract" theory given to Dumoulin's doctrine.

[36] See, e.g., Cass. April 4, 1881, Lesieur v. Mauchien, S. 1883.1.65; July 18, 1905, Fanny v. Balsan, Rev. 1906, 200; April 26, 1950, Landauer, J.C.P. 1950, IV, 93. See also the following judgments of lower courts: Trib. Civ. Chartres May 23, 1900, Cintrat v. Boulaud, Clunet 1901, 354; Trib. Civ. Seine, January 17, 1924, Hiss et Dame Higmann, Rev. 1925, 226; November 17, 1926, Archdeacon v. Savoli, Clunet 1928, 404; Trib. Civ. Meaux May 4, 1928, Pillon v. Peck, Clunet 1928, 1223; Pau November 17, 1932, Etchegoin v. Etchegoin, Clunet 1935, 95. Except in the case of Archdeacon v. Savoli, in which the court applied the New York law of the intended domicil, the matrimonial domicil was also the domicil of the husband at the time of the marriage.

[37] See, e.g., Cass. May 5, 1953, Dulles v. Dulles, D. 1953, 479; Trib. Civ. Versailles May 15, 1924, Kelly v. Gould, Rev. 1925, 240, Clunet 1925, 415. Concerning the meaning of the concept of "nationality" in these cases, see G. R. Delaume, American-French P.I.L., 44. See also J. D. Falconbridge, "Renvoi in New York and Elsewhere," 6 Vanderbilt L. Rev. (1953) 708, 721 *et seq.*

[38] Cass. May 5, 1953, Dulles v. Dulles, cited in the preceding note. See also Article 37 of the Draft of a Codification of French Private International Law (as translated) in K. Nadelmann and A. von Mehren, "Codification," 1 Am. J. Comp. L. (1952) 404, 422, and the present writer's note, *ibid.*, 390, 393.

[39] Same case.

[40] Cass. December 14, 1880, Desaye v. Clément, D. 1881, 1. 310; Paris December 30, 1891, Homans v. Homans, D. 1892.2.43; Trib. Civ. Millau July 18, 1903 and Montpellier April 25, 1904, Fanny v. Balsan, Clunet 1905, 377. (aff'd. Cass. July 18, 1905, cited *supra* note 36). Trib. Civ. Belfort June 13, 1911, and Besançon March 18, 1912, Amsler v. Herbelin, Clunet 1913, 171.

[41] No better illustration of the French practice can be found than the recent judgment of the French Court of Cassation in the case of Dulles v. Dulles, supra note 37. In this instance,

any clear intention concerning the law applicable to their relationship, if they had thought of the problem, they would have made an antenuptial agreement and expressed their views on the question. Since they have failed to do so, how can a court ever find an intention which was non-existent at the time of the marriage? From this point of view, the French practice deserves the sharp criticism which it has encountered both in France and abroad.[42] Moreover, until a court has had the opportunity to hear the case, it is impossible to ascertain what are the property rights, either separate or common, of the parties. This is even aggravated by the fact that French courts do not restrict their investigations to circumstances prior to or contemporaneous with the marriage, but also take into consideration subsequent factors. Therefore, until all the facts are known, that is, until the parties have died and a court has tried the case,

an English woman married an American citizen in Paris, France, where both parties resided. The marriage was celebrated civilly in accordance with the provisions of the French Civil Code. No antenuptial agreement was made. After a French divorce decree, the question was raised whether the divorced wife could claim a share in her husband's property as community property accruing to her under the French law. Her claim was denied. The Court found that the presumed intention of the parties had been to submit their property relations to their national law (whether English, or American, or both is not entirely clear) under which the system of separate property prevailed. Said the court:

"Considering on the one hand that the Court of Appeals finds that the Dulles couple have lived, for the most part, the life of wealthy tourists in various countries abroad; that Dulles who owned a large fortune in the United States has not transferred his capital to France, being satisfied to live there on his income (neither he nor his wife having been subject to French income taxes); that he has never done any business in France, nor acquired any immovables there and that the attitude of the Dulles couple excludes any intention of establishing their domicile in France in the sense of the *jurisprudence*;—Considering, on the other hand, that the Court of Appeals finds that even the fact of the couple's residence in France, whatever might have been the length of their stay, is insufficient to overcome other factors to the contrary which the Court specifies, and which are anterior to, simultaneous with or subsequent to the marriage, revealing the real and mutual intention of the parties as to the choice of a regime governing their property rights; and, in particular, that the celebration of the marriage by the French Registrar of Vital Statistics is insufficient to evidence the intention of the parties to adopt the regime imposed in France upon any French citizen married without an antenuptial agreement;—Considering, moreover, that Dulles had married three years before, in the same city hall, an American woman and that, after a divorce, the respective rights of the spouses had been liquidated in accordance with the rules governing separation of property;—Considering that it is certain that Dulles when marrying in France, without an antenuptial agreement, an English woman, in a third marriage, could not believe that there would be between them a community of property;—Considering that after the marriage the intention of the Dulles couple to adopt a regime of separation of property has been made concrete in a power of attorney dated June 18, 1942;—WHEREAS on the basis of these findings and of the construction of these parties' intentions, the Court of Appeals could legitimately hold that a set of facts established that the intention of the Dulles couple had been not to submit themselves to the law of the country where they married, but to conform with their personal status; consequently the judgment in question . . . is legally justified;—THEREFORE the appeal should be dismissed."

[42] See e.g. in France, 4 Rep. Dr. Int., 187–188; 5 Niboyet, Traité, 402 *et seq.*; G. R. Delaume, "L'Autonomie de la Volonté en Droit International Privé," Rev. 1950, 336–7, and, in the United States, Lorenzen, "The French Rules of Conflict of Laws," 38 Yale L.J. (1928) 165, 175; Goodrich, Conflict, 387; 1 Rabel, 343 *et seq.*

the parties themselves, their heirs, or their creditors can only surmise what law is applicable to the relationship. Since French courts have recourse to a wide range of criteria to determine the so-called intention of the parties, the chances that such conjectures will coincide with the courts' findings are rather remote.[43] It is small wonder, therefore, that American courts have sometimes been misled by the evidence which has been submitted to them to prove French law,[44] or have been induced to make inaccurate statements on what the French rule of conflict of laws is in the field of marital property.[45]

10. The French theory of implied contract, although well-known in the United States,[46] has had little influence on American cases.[47] Broadly stated and subject to qualification, the American rule is that the law of matrimonial domicil governs rights in movables and the *lex rei sitae* rights in immovables.[48] Thus, in the case of *In re James' Will*,[49] the law of the matrimonial domicil in Louisiana was held applicable to determine the rights of an American widow in the personal estate of her deceased husband, even though the estate included movables acquired in France during the period of the Louisiana marital domicil.[50] A change in the *situs* of the movables or the acquisition of movables in a foreign country

[43] These practical inconveniences did not appear until the middle of the last century, since from the time of Dumoulin until around 1850 the only controlling factor was the matrimonial domicil. During the course of the last century other factors have been taken into consideration. See E. Lorenzen, "The French Rules of the Conflict of Laws," 38 Yale L.J. (1928) 165, 177–78; G. R. Delaume, Conflits, 248.

[44] See Dulles v. Dulles, 369 Pa. 101, 85 A. 2d 134 (1952). See also our note on that case in 1 Am. J. Comp. L. (1952) 390.

[45] Harral v. Harral, 39 N.J. Eq. 279, 51 Am. Rep. 17 (1884).

[46] See Saul v. His Creditors, 5 Mar. (N.S.) 569, 16 Am. Dec. 212 (1827).

[47] See however, Bonati v. Welsh, 24 N.Y. 157 (1861). This case is commented upon *infra* in paragraph 17. See also a dictum in Castro v. Illies, 73 Am. Dec. 277, 282–283 (1858); R. Leflar, "Community Property and Conflict of Laws," 21 Cal.L.Rev. (1933) 221, 223.

[48] See e.g. Goodrich, Conflict, 383 *et seq.*, *Id.*, "Matrimonial Domicile," 27 Yale L.J. (1917) 49; A. Harding, "Matrimonial Domicile and Marital Rights in Movables," 30 Mich. L. Rev. (1932) 859; Ch. Horowitz, "Conflict of Laws Problems in Community Property," 11 Wash. L. Rev. (1936) 121, 212; R. Leflar, *op. cit.* in the preceding note; R. Neuner, "Marital Property and the Conflict of Laws," 5 La. L. Rev. (1943) 167; G. Stumberg, "Marital Property and the Conflict of Laws," 11 Texas L. Rev. (1932) 53; Restatement, Conflict of Laws, secs. 237, 289, 290.

[49] 221 N.Y. 242, 116 N.E. 1010 (1917); see also Harral v. Harral, 39 N.J. Eq. 279, 51 Am. Rep. 17 (1884).

[50] This case also deserves attention in another respect. By way of dictum, the court suggested that the evidence required to establish a change of domicil from the United States to a foreign country, such as France, may be greater than from one state of the Union to another (221 N.Y. 242, 256 (1917); comp. similar cases cited in G. R. Delaume, American-French P.I.L., 20).

does not modify the relationship, which remains governed by the law of the matrimonial domicil.[51]

11. The rule that immovables are governed by the *lex rei sitae*, is illustrated by the case of *Majot's Estate*.[52] A marriage had been celebrated in France between French citizens residing in that country. No antenuptial agreement had been made. Subsequently, the husband acquired an immovable in New York, and upon his death, his wife claimed one half of the immovable as community property accruing to her under the French law of the matrimonial domicil, which was also the national law of the parties. Her claim was dismissed because, under the New York law of the *situs*, the immovable was the separate property of the deceased husband. This case is a good example of the opposing results which may be reached under the American and the French rules for, under the French rule, the immovable involved probably would have been considered community property. This clash between the two rules should not be overestimated, however, since there are several ways in which their actual consequences can be reconciled in practice.

12. No difficulty exists in practice, with regard to immovables owned by the parties at the time of the marriage. These immovables are excluded from the French community and remain separate property.[53] It is irrelevant, therefore, whether the *lex rei sitae*, the *lex domicilii*, or the national law of the parties, either French or American, is applicable, since the property involved is separate property.

The practical difficulty is, therefore, limited to immovables acquired by purchase during coverture. This was the problem involved in the case of

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[51] See e.g. Goodrich, Conflict, p. 385; R. Leflar, *op. cit.*, 21 Cal. L. Rev. (1933) 221, 226–228; Restatement, Conflict of Laws, sect. 291. See, however, in favor of the application of the *lex situs*, Gooding Milling and Elevator Co. v. Lincoln County State Bank, 22 Idaho 468, 126 P. 772 (1912). There are a few exceptions to the above rule. A seeming exception is found in the dictum of an old Louisiana case which refers to the *lex loci celebrationis* as the applicable law. Murphy v. Murphy, 5 Martin 83, 12 Am. Dec. 475, 476 (La. 1817). In this case, however, the place where the marriage had been celebrated apparently coincided with the matrimonial domicil and the judgment is not, therefore, entirely clear. Another exception is probably that of the Civil Code of Louisiana (art. 2400) which seems to provide for the application of the *lex rei sitae*, at least with regard to movables located in that state. See in this respect, H. S. Daggett, The Community Property System of Louisiana, 105 *et seq.*; 1 Rabel, 341.

[52] 119 N.Y.S. 888 (1910), aff'd 199 N.Y. 29. This case shows clearly that the American rule is inconsistent with the English case, In re De Nicols, De Nicols v. Curlier (1900) 2 Ch. 410. With regard to the other case De Nicols v. Curlier (1900), A.C. 21, concerning movables, see *1 Rabel*, 346, 356, 368; Goodrich, Conflict, 386.

[53] Article 1404, para. 1, Fr. Civ. Code: "Immovables owned by the spouses at the time of the celebration of the marriage, or those which accrue to them during coverture by descent, do not fall within the community."

Majot's Estate, cited above.[54] If, as in that case, the purchased immovable becomes the separate property of the husband, the wife's interest to one half of the money with which the purchase was made is defeated. This consequence may be avoided, however, by extending to this situation the concept of resulting or constructive trust under which the husband would be considered as a trustee for the benefit of his wife as to one half of the interest.[55]

Let us consider now the converse case in which the matrimonial domicil is in a separate property state and either the husband or the wife purchases with his or her separate funds some land situated in France. Under Section 238 of the *Restatement of the Law of Conflict of Laws*, the French law of the *situs* would be applicable with the apparent result that the purchased land would be considered community property. This assumption is doubtful, however, for French and American law may again be reconciled to safeguard the interests of each spouse. In such cases, American courts have held that an immovable acquired in a community property state with separate funds is separate property unless the *lex rei sitae* provides otherwise. Pursuant to this doctrine of replacement,[56] the land purchased in France is separate property, unless there is an express provision to the contrary in French law. That no such provision exists in France is sufficiently clear from the fact that the doctrine of replacement is also part of French law.[57] In American-French relations, therefore, the rule of the *Restatement* is overgeneralized.

13. However, even if Section 238 of the *Restatement* were applicable, it would not necessarily follow that French-acquired immovables should be deemed community property. Pursuant to Section 8 of the *Restatement*:

"All questions of title to land are decided in accordance with the law of the state where the land is, including the Conflict of Laws rule of that state."

According to this rule, if the French law of the *situs* refers the matter

[54] See *supra* note 52.

[55] Comp. the case of Depas v. Mayo, 11 Mo. 314, 49 Am. Dec. 88 (1848).

[56] See Goodrich, Conflict, 381, 1 *Rabel*, 338 *et seq.*; Cook, The Logical and Legal Bases of the Conflict of Laws, (2nd printing 1949) 276 *et seq.*; Neuner, *op. cit.*, 5 La. L. Rev. (1943) 167, 170 *et seq.* The present writer wishes to acknowledge the fact that it is the reading of this last article which attracted his attention to the desirability of investigating some of the practical problems discussed in the text above.

[57] Thus, in the case of a barter (*échange*), an immovable exchanged for another immovable which is separate property is itself separate property (Article 1407 Fr. Civ. Code). Pursuant to Articles 1434–1435 Fr. Civ. Code, real or personal property purchased with the proceeds of a sale of the separate property of either spouse may remain separate property if simple formalities (*remploi* or reinvestment) are fulfilled. These provisions illustrate the French doctrine of replacement (in French terminology, *subrogation réelle*), which has a much wider scope.

back to the American law of the matrimonial domicil, the latter must be applied, and the land purchased in France is again separate property. This is a perfect case of renvoi. Practically, the renvoi leads to the same result as that which is achieved by the doctrine of replacement, though the reasoning is different. Yet, it is difficult to forecast whether an American court would accept a renvoi from French law in circumstances similar to those of our example.[58]

In this respect, the American rule seems different from the French, since the doctrine of renvoi is an integral part of the French rule of conflict of laws. Thus, a French case, accepting the renvoi from the normally applicable American law, held that the capacity of an American woman to sell without her husband's authorization land that she owned in France was governed by the French law of the *situs*.[59] Similarly, a recent case has held, by renvoi of the law of New York, that an immovable located in France was community property.[60] However, these cases were decided by lower courts, and it is at present somewhat debatable in which respect and to what extent they may affect the French rule of conflict of laws.[61]

14. Finally, reference must be made to the concept of public policy which may prevent a French or an American court from enforcing property rights validly acquired in the other country. No case in point has been found, although several American cases refer to the problem by way of dicta.[62] The rather extensive concept of *ordre public* in France may also prohibit the enforcement in that country of rights created in the United States, for instance under a trust agreement.[63]

[58] See, e.g., E. Griswold, "Renvoi Revisited," 51 Harv. L. Rev. (1938) 1165; J. D. Falconbridge, "Renvoi in New York and Elsewhere," 6 Vanderbilt L. Rev. (1953) 708; A. Nussbaum, American-Swiss Private International Law, (1950) 21 *et seq.*; G. R. Delaume, American-French P.I.L., 44 *et seq.*, especially 45–46.

[59] Trib. Civ. Pau July 28, 1904, L.. v. G.., M.., and G.., M.., L.. v. P.., Clunet 1905, 194. The rather dramatic opposition made by Rabel (1 Rabel p. 353) between the French and German law in this field is nonexistent, since the German case cited by Rabel (1 Rabel, 352) is the German counterpart of the judgment of the French tribunal of Pau.

[60] Trib. Civ. Orléans February 27, 1951, Succession Morelos, Rev. 1954, 358.

[61] The case of Fanny v. Balsan (Cass. July 18, 1905, Rev. 1906, 200) sometimes cited as rejecting the renvoi, is not in point. In that instance, a Frenchman residing in the United States for several years, married an American woman in New York where the couple fixed their domicil. The court held that the law of New York was applicable. Since only rights in personalty were involved, there was of course no possible renvoi.

[62] See, e.g., Murphy v. Murphy, 5 Martin 83, 12 Am. Dec. 475 (La. 1817); Crosby v. Berger, 3 Edw. Ch. 538 (N.Y. 1842); De Pierre v. Thorn, 4 Bosw. 266 (N.Y. 1859); Richardson v. De Giverville, 107 Mo. 422, 17 S.W. 974 (1891).

[63] See *supra* notes 33 and 20. It is also conceivable that the foreign law may be disregarded on the ground of evasion (*fraude à la loi*), a doctrine which has a much broader scope in France than in the United States. No case in point has been found, but see several examples of evasion in French-American relations in G. R. Delaume, American-French P.I.L., 51.

II. The Law Governing Marital Property When There is a Change in the Status of the Parties or Upon the Termination of the Relationship

15. There are fundamental differences between American and French law in this field. It is a settled general rule in France that the relationship is unaffected by a change in the status of the parties. In the United States, on the contrary, a change of domicil alters marital relations with regard to movables acquired subsequently, except when there is an express provision to the contrary in an antenuptial agreement. Difficult questions, both substantive and procedural, also arise after the termination of the relationship.

16. *A. Consequences of a change of status.* According to the French rule, the property relations of the spouses are unaffected by a change in the status of the spouses, irrespective of whether they married with or without an antenuptial agreement. Thus, when the matrimonial domicil is in a state where the system of separate property prevails and the parties go to France and acquire a new domicil there, the wife cannot claim any community rights in her husband's property, *either personal or real*, acquired by him in France after they moved there.[64] This conclusion holds true in cases where the national law of the parties governs and this law is that of a separate property state, and the parties subsequently acquire French nationality. Naturalization in France has no effect upon the property rights of the parties.[65]

In one instance, however, a change of status may have direct influence. When there is no antenuptial agreement, or when such an agreement does exist but there is no clear indication of the parties' intention at the time of the marriage, this intention is inferred by the French courts from circumstances subsequent as well as prior to or contemporaneous with the marriage. A change of status may, therefore, become a controlling factor in the determination of the law applicable to the relationship.[66] Moreover, such a change of status may have retrospective effect since

[64] See, e.g., Trib. Civ. Seine January 17, 1924, Hiss et Higmann, Rev. 1925, 226; Trib. Civ. Meaux May 4, 1928, Pillon v. Peck, Clunet 1928, 1223.

[65] See, however, article 40 of the Draft of a Codification of French Private International Law, concerning the substitution of French law for that governing the property relations of the parties when the latter are naturalized in France during coverture (K. Nadelmann and A. von Mehren, "Codification," 1 Am. J. Comp. L. (1952) 404, 422).

[66] See, e.g., Besançon March 18, 1912, Amsler v. Herbelin, Clunet 1913, 171. In that case, the parties married in New York where both resided. They went to Switzerland and, years later, settled in France. The court found that the parties had "intended" French law to govern their property rights. Their property was, therefore, community property under French law and not separate property as under the law of New York. On this "amazing" case and others, see also 1 Rabel, p. 345.

the *lex causae*, once determined, applies to the relationship as of its inception, that is as of a time prior to the change of status, which is not without inconvenience. A change of status adroitly planned may permit an unscrupulous spouse to build up a set of facts calculated to "evidence" the "assumed intention" of "both" parties to adopt the law which is most favorable to his or her interests.

17. The American rule is that a change of domicil imports a change in property relations with regard to movables subsequently acquired, subject of course to modification by an express antenuptial agreement.[67]

It must be noted, however, that the law of the new domicil applies only to future acquisitions and has no retrospective effect. The law of the new domicil does not divest property rights previously acquired; a California statute which attempted to modify this general rule has been held unconstitutional as violating the Due Process clauses of the state and federal Constitutions.[68] Similarly, in *Bonati v. Welsh*,[69] two French citizens married in France without an antenuptial agreement. The wife inherited some real property which she sold, and the proceeds thereof were appropriated by the husband. The latter deserted his wife and removed alone to New York where he was domiciled to the time of his death. The wife claimed restitution of the amount of the sale of her property unduly appropriated by the deceased for which he was accountable to her under French law. It was held, one judge dissenting, that she was entitled to have her claim paid because the removal of the husband alone to the United States could not divest her of a right which had already accrued to her under French law.[70]

When the parties have made an antenuptial agreement, the effect of a change of domicil upon their respective rights in property acquired after the removal depends upon the terms of the agreement. If the latter "speaks fully to the very point,"[71] and stipulates that its provisions shall

[67] See the case of Majot's Estate 119 N.Y. S.888 (1910), aff'd 199 N.Y. 29. See also Goodrich, Conflict, 388 *et seq.*; Leflar, *op. cit.*, 21 Calif. L. Rev. (1933) 221, 230 *et seq.*; Neuner, *op. cit.*, 5 La. L. Rev. (1943) 167, 175, *et seq.* The rule has been embodied in certain statutes, such as La. Civ. Code. article 2401; Arizona Rev. Code §63–306 (1939); Vernon's Texas Stat. article 4627 (1936).

[68] In re Thornton's Estate, 1 Cal. 2d 1, 33 P 2d 1, 92 A.L.R. 1343 (1934).

[69] 24 N.Y. 157 (1861).

[70] This case is not entirely clear, however. There are in the judgment several dicta which refer to the theory of implied contract (24 N.Y. 157, 162–3 (1861); comp. dictum Castro v. Illies, 22 Texas 479, 73 Am. Dec. 277, 282–3 (Texas 1858)). Therefore, it is not inconceivable that this case is one of the few American decisions influenced by the French theory.

[71] See Story, Conflict of Laws, 8th ed. §143.

govern all future acquisitions in whatever country the parties may reside, it will be given effect, subject of course to public policy.[72]

On several occasions, however, American courts have been inclined to restrict the scope of foreign agreements to the property specifically mentioned therein or to that acquired in the state or country of the matrimonial domicil.[73] All the American cases which have been found, however, concern the effect of French agreements upon land in the United States, and the application of the American law of the *situs* may be explained by the broad scope of the *lex rei sitae* in this country.[74]

18. Another problem, closely connected with, although distinguishable from, the foregoing is whether during coverture the parties may alter their property relations by agreement.

In France, the present rule is that the law governing the relationship also governs the right to alter it by agreement. For instance, in *Etchegoin v. Etchegoin*,[75] the question at issue was whether the Spanish wife of a deceased Frenchman who had been continuously domiciled in California after the marriage could claim a share in his French estate as community property under the California law, or whether effect should be given to a separation agreement made in the same state after the marriage. The second alternative prevailed, and the claim of the surviving wife was denied, since under the agreement she had no interest in her husband's property in France. No American case in point has been found, although one New York case appears contrary to the French rule.[76]

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[72] Decouche v. Savetier 3 Johns. Ch. 190, 8 Am. Dec. 478 (N.Y. 1817). See also Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277, (dicta 280, 281, 284) (1858); Richardson v. De Giverville, 17 S.W. 974 (dictum 978) (1891); Crosby v. Berger, 3 Edw. Ch. 538 (N.Y. 1842); Streb ler v. Wolf. 152 Misc. 859, 273 N.Y.S. 653 (1934).

[73] See, e.g., Goodrich, Conflict, 391–2; 1 Rabel, 368.

[74] See, e.g., Castro v. Illies, supra note 72 and text supra paragraph 8.

[75] Pau. Nov. 17, 1932, Clunet 1935, 95. See also two leading cases, Cass. June 4, 1935, Zelcer v. Schwab, Rev. 1936, 755 (French-Polish relations), and May 5, 1938, Chavan v. Chavan, Rev. 1938, 659 (French-Swiss relations). Rabel's dramatic opposition between cases where French law or a foreign law respectively governs the relationship must be accepted with caution (1 Rabel, 362), for the learned author apparently overlooked the case of Etchegoin v. Etchegoin.

[76] Hutchinson v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933). See notes 33 Col. L. Rev. (1933) 1251; 47 Harv. L. Rev. (1933) 350; 32 Mich. L. Rev. (1933) 696. In that case the parties who resided continuously in Quebec had entered into an antenuptial agreement whereby the husband promised to establish a trust fund of $125,000 for the benefit of his wife. After marriage, they agreed that, in lieu of this trust fund, the husband would set up a trust of $1,000,000 for the benefit of his wife and children. The trust agreement was executed in Canada, although it had been drawn up in New York, where the securities constituting the *corpus* of the trust were located and the trustee appointed. The agreement was invalid under the law of Quebec, which prohibited any changes in the property relations of the parties during coverture, although it was valid under the New York law of the *situs*. The Court of Appeals of New York

19. *B. Termination of the relationship.* The property relations between husband and wife do not normally survive dissolution of the marriage. However, in states or countries where the system of community property prevails, there are several exceptions to this rule, and the relationship may either endure after the dissolution of the marriage or be terminated before that date.

20. Although cases concerning annulment of marriage are not rare in American-French relations,[77] most of the decisions which have been found concern the personal relations of the parties and their children and do not deal with property relations. On the French side, it is generally agreed that these relations should be regarded as joint tenancy, or, according to French terminology, as co-ownership under a *de facto* partnership, a substitute for the community of property which would have prevailed if the marriage had been valid and there had been no antenuptial agreement or the latter had been void. In the conflict of laws, therefore, the law applicable to joint tenancy will govern. In one instance, however, the rule is different. That is when a marriage, although annulled, has been declared putative. Pursuant to articles 201 and 202 of the French Civil Code, when a marriage has been declared void but was contracted in good faith by one or both parties, that party, or both as the case may be, enjoys all the civil rights, including property rights, resulting therefrom as if the marriage had been valid.[78] In this event, the relationship may be governed either by the proper law of the antenuptial agreement or the law presumptively intended by the parties, as the case may be, in accordance with the French rules of conflict of laws previously explained. This last solution prevailed in *Archdeacon v. Savoli*, the only case in point which has been found.[79]

21. When the marriage is dissolved upon the death of either spouse, it would seem that property interests already acquired under the appro-

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held that New York law applied. Because of the similarity of French and Quebec law in this field, there is little doubt that such a judgment as that of the New York Court of Appeals would have about the same chance of being recognized in France as it had in Quebec.

[77] See G. R. Delaume, American-French P.I.L., 48 *et seq.*

[78] Comp. Louisiana Civil Code, articles 117, 118.

[79] In Trib. Civ. Seine November 17, 1926, Clunet 1928, 404, a marriage celebrated in New York between a French minor and an American girl was void under the French law for lack of parental consent. It was shown that the Frenchman had misrepresented his age and that the girl had been induced into the marriage believing him to be 24 years of age. It was held that she was entitled to the benefit of a putative marriage, and that the property relations of the parties were separate property under the law of New York which was presumed to have been the intended law in the absence of an antenuptial agreement to the contrary. The court also awarded damages to the girl, a form of compensation corresponding to that which American courts may grant under certain circumstances (see, e.g., 1 Rabel, 546).

priate marital property system remain unaffected, while expectancies or contingencies should be governed by the law governing inheritance. Although this is the general rule, the distinction between matters of marital property and matters of inheritance is not always easy to draw. Thus, the question has arisen in France whether the right of a widow to dower under the law of an American state ought to be qualified as a right to inherit from her husband or rather as a marital property right. The second solution seems to have prevailed in the case of *Gourié v. Gourié*,[80] whereas the first was adopted in two other cases decided by the Court of Cassation.[81] No corresponding case has been found in the United States, although the complexity of the French law in this field could easily be a source of difficult characterization for an American court.

22. When the marriage is dissolved by divorce, it can be stated generally that the effect of a divorce decree, either domestic or foreign, upon marital property rights is governed by the law applicable to such rights.[82] For example, the law governing marital property relations also determines the date as of which the relationship is terminated.[83]

There is, however, a fundamental difference between American and French law concerning the effect of a divorce upon marital property rights. In France, a divorce decree, though it terminates both personal and property relations, has no bearing upon the determination and the division of the property rights of the parties. All questions concerning the determination and the division of these rights must be litigated and adjudicated separately if any difficulty is raised in this connection, a fact which has sometimes been overlooked by American courts.[84] There is no statute in France authorizing a court to divide marital property in a

[80] Paris January 6, 1862, S. 1862 2.337. See also Robertson, Characterization in the Conflict of Laws (1940), 163.

[81] Cass. April 4, 1881, Lesieur v. Mauchien, S. 1883.1.65; Cass. August 16, 1869, Vibert v. Lejeune, S. 1869.1.417.

[82] With regard to the recognition and enforcement of foreign divorces in American-French relations, see G. R. Delaume, American-French P.I.L., 62 *et seq.*

[83] Thus, article 252, para. 6, Fr. Civ. Code, which provides that a divorce decree operates between the parties from the date of the filing of the petition, and between them and third persons from the recording of the decree on the register of vital statistics, concerns only those cases in which marital property relations are governed by French law, regardless of whether the divorce decree is French or foreign (See 5 Niboyet, Traité, 451). It has also been held in France that the effect of a New Jersey divorce decree upon the property relations of a French couple was governed by the French law applicable to these relations. The latter law, therefore, determined the wife's right to accept or renounce her rights in the community property and the period during which this right of election could be exercised (Lyon February 3, 1932, Bernet v. Phily, Clunet 1932, 930; comp. Lemye v. Sirker, 226 App. Div. 159, 235 N.Y.S. 273 (1929) involving the relations between the United States and Belgium).

[84] See our comments on the case of Dulles v. Dulles (369 Pa. 101, 85 A2d. 134 (1952) in 1 Am. J. Comp. L. (1952) 390.

divorce decree as shall be "equitable and just," "right," or "expedient." While, in the United States, the claim by a party to a divorce action to be entitled to a division of marital property has sometimes been characterized as an issue of divorce,[85] the patrimonial effects of divorce are characterized in France as an issue of marital property.

23. Under French law, there are instances in which community property may either survive dissolution of the marriage or be terminated previously. For instance, at one time prior to the promulgation of the Civil Code, the Custom of Paris provided that if, upon dissolution of the marriage by death, the surviving spouse did not take any step to divide the community, it should continue between this spouse and the decedent's heirs. In *Murphy v. Murphy*,[86] the question at issue was whether continuation of community should be characterized as an issue of "marital property" or as an issue of "inheritance." The second alternative prevailed, a decision difficult to reconcile with the views expressed by leading French authors of the eighteenth century.[87]

Although the continuation of community upon death still prevails under some modern systems of law,[88] it has now disappeared from the French Civil Code, and the interest of the foregoing case is therefore mainly historical. It occasionally happens, when the community is terminated by death and there are infant children, that the surviving spouse retains possession of community property and administers it for some time, for instance, until the children reach their majority. In such a case, the *de facto* continuation of community can not be considered as a continuation in the legal sense. Legally, the community is dissolved upon the death of the deceased spouse, and the subsequent relationship between the surviving spouse and the children is joint tenancy governed by the law applicable thereto, possibly different from that previously governing community property.

24. Also, under modern French law, there are instances in which community property may be terminated before the dissolution of the marriage. For example, after a judicial separation *a mensa et thoro*, the

[85] See Latterner v. Latterner, 121 Calif. App. 298, 8 P2d, 870 (1932) referred to by Marsh, Marital Property in Conflict of Laws, 142; F. V. Harper, "Effect of Foreign Divorce upon Dower and Similar Property Interests," 26 Ill. L. Rev. (1931) 397, 406.

[86] 5 Martin 83, 12 Am. Dec. 475 (La. 1817).

[87] Bouhier, Observations sur la Coutume du Duché de Bourgogne, Ch. XXVIII, Nos. 67 *et seq.* See also G. R. Delaume, Conflits, 254 *et seq.*

[88] See, e.g., German Civil Code, articles 1483–1518; Swiss Civil Code, articles 229–236. Under the French law relating to absentees, the spouse of an absentee has an option either to continue or to terminate the community (articles 124 *et seq.* Fr. Civ. Code). This right of election is different, however, from the continuation of community of the French pre-Code law or of the German or Swiss law.

property relations of the parties are those of separation of assets, and the community which might have existed previously comes to an end, even though the marriage is not dissolved (article 311, Fr. Civ. Code). It is generally agreed in France that the patrimonial effects of judicial separation, like those of divorce, are governed by the law applicable to marital property, although there are a few instances in which the French courts have not observed this rule and have applied instead the national law of the parties.[89] No corresponding American case has been found.[90]

In those states or countries where the system of community property prevails, specific statutes sometimes provide that the community may be terminated, during coverture, by a decree rendered at the suit of the wife whenever her dowry is imperiled by her husband's mismanagement or when she has reason to believe that, because of the disorder of his affairs, his property may not be sufficient to meet her rights and claims.[91] From the point of view of conflict of laws, there is little doubt that the law applicable to community property determines whether the wife may file a petition for a separation of property and, if so, on what grounds.[92] The same law also governs in respect to the division and distribution of community property, regardless whether the decree is domestic or foreign.[93] The problem is somewhat complicated, however, because it requires delicate characterization between matters of substance and matters of procedure.

For instance, in *Le Breton v. Miles*,[94] a French couple had stipulated, by an antenuptial agreement made in New York, where they resided, that their property relations should be community of acquests and gains

[89] See, e.g., Trib. Civ. Seine February 13, 1908, Sedano, Rev. 1909, 875. See also G. R. Delaume, "Les Conflits de Lois et de Juridictions en Matière de Divorce, de Séparation de Corps et de Nullité de Mariage en Droit Français," Revue Hellénique de Droit International 1951, 261.

[90] Two old cases involved the capacity of a woman judicially separated from her husband in France to contract (Garnier v. Poydras, 13 La. 177 (1839)) and to sue (Rapp v. Peyroux, 13 La. 218 (1839)) in Louisiana. It was held in both cases that the law of the woman's domicil in France was applicable, a result consistent with the Louisiana rule in this field. See note 27 Yale L.J. (1917) 816.

[91] See, e.g., French Civil Code, article 1443. Similar problems also arise with regard to "dotal" property when that kind of property is stipulated in an antenuptial agreement (article 1563, Fr. Civ. Code; see Planiol, Ripert and Boulanger, Traité Elémentaire de Droit Civil, 4th ed. 1951, *458 et seq.*). See also Civil Code of Louisiana, articles 2425 *et seq.*, 42 Corpus Juris Secundum, 56, note 91.

[92] See, e.g., Cass. March 7, 1870, Koehler v. Delpech, S. 1872. I. 361 (French law held applicable to a petition for a separate property decree filed in France by an alien wife whose marital property interests were governed by that law).

[93] Another question is that of the recognition and enforcement of a foreign decree in France or in the United States. See *supra* note 82.

[94] 8 Paige 261 (N.Y. 1840).

under the French law. The wife had retained some separate personal property, part of which had been lost by her husband's mismanagement, and she had reason to believe that his property would be insufficient to meet her claims. She applied to a New York court for a decree of separation of property. It was held that, in respect to personal property, French law was applicable, but that the suit could not be maintained because under the law of New York, as it then stood, a feme covert could not hold separate property free from the control of her husband, except through the medium of a trustee. Nevertheless, by exercising its equitable powers, the court held that in cases such as this, the husband being trustee for his wife, the latter was entitled to protection of her property. The court ruled, consequently, that failing an agreement between the petitioner and her husband as to the manner in which her property should be invested for the safeguard of her interests, this property should be invested by the receiver "on bond and mortgage, or in public stocks, in the name of the assistant register." Although the decision is commendable in that it achieves a result satisfactory for the protection of the wife's property, its legal basis is not entirely clear. On the one hand, the court obviously attempted to reach a result which would be closely consistent with, although technically different from, that which would have been reached in the circumstances under French law. This would lead to the conclusion that the court characterized the issue as a matter of "substance." On the other hand, the technique used by the court in reaching its decision is so intimately linked with procedural considerations that it could be argued that the characterization "procedure" prevailed and that the court considered the whole matter as going to the "remedy" rather than to the "right."

25. Similar problems of characterization arise in France. Under French law, as already described, community property can be terminated during coverture only by a decree of judicial separation or of separation of property. Pursuant to article 1443, §2, of the French Civil Code, any separation agreement between husband and wife is null and void *ab initio*, and the question has arisen whether this prohibition is substantive or procedural in character. If the latter, no separation agreement can validly be made in France, and the parties must always institute legal proceedings in that country, regardless of whether their property relations are governed by a foreign law which, like the law of California[95] or Texas,[96] authorizes separation agreements. If the rule is characterized as substantive, there is no obstacle to making in France separation agreements

[95] See, e.g., Etchegoin v. Etchegoin, *supra* note 75.

[96] Vernon's Texas Stat. Suppl. 4624 a.

permitted by the law applicable to the relationship, subject of course to public policy. The latter view seems preferable. The prohibition of separation agreements in France is a consequence of the immutability rule, which prevents the parties from altering their property relations during coverture. Since the immutability rule seems to be applicable only to those relations which are governed by French law,[97] it follows that whenever a foreign law is applicable and permits separation agreements to be made during coverture, such agreements can be made in France. Nevertheless, another rule of French law considerably limits the scope of this last proposition. This is the rule prohibiting divorce by mutual consent. Any separation agreement incidental to a divorce by mutual consent is void under French law if made in France,[98] and is likely to be unenforceable in that country if made abroad as contrary to French public policy.[99] However, a recent French judgment[100] has recognized a divorce by mutual consent between a Russian citizen and his French wife, both domiciled in Ecuador at the time of the divorce. It could be argued, therefore, that if a foreign divorce by mutual consent is not, as such, contrary to French public policy, a separation agreement incidental thereto could also be enforced in France. Since the judgment in the case in question was not entirely clear, it is still too early to state with confidence what the outcome will be.[101]

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[97] See *supra* paragraph 18.

[98] See, e.g., Cass. April 3, 1935, Itier v. Maisonnier, S. 1935. I. 230 (French-English relations); January 26, 1938, Masielli v. Casoli, Rev. 1938, 475 (French-Italian relations). In this respect a recent article contains a serious mistake as to French law (See A. Macdonald, "The French Law of Marriage and Matrimonial Regimes," 1 Int'l. & Comp. L. Q. (1952) 313, 320) since it is there stated that the spouses during coverture by agreement may substitute separate for community property.

[99] See Trib. Civ. Seine July 5, 1939, Kurzinsky v. Kurzinsky, Rev. 1939, 450, which held that a separation agreement made in New York by German citizens and governed by German law was unenforceable in France on the ground of public policy.

[100] Cass. April 17, 1953, Rivière v. Roumiantzeff, Rev. 1953, 412.

[101] Pursuant to article 3, para. 3, Fr. Civ. Code, the national law of the parties i.e., the Russian law of the husband or the French law of the wife or both, governed in respect to divorce and neither the Russian nor the French law permitted a divorce by mutual consent. The divorce should, therefore, have been denied recognition in France. The court apparently held that the law of the domicil in Ecuador was applicable. This would be a violation of the French conflict of laws rule according to which divorce is governed by the national law of the parties (article 3, para. 3, Fr. Civ. Code). The court noted, however, that the husband had acquired by naturalization the nationality of Ecuador, and the application of the law of that country would, therefore, appear justified under the French rule. This reasoning is doubtful, however, for it seems that the naturalization of the husband was subsequent to the divorce. (See the judgment of the inferior court, J.C.P. 1949, II, 4794, and our observations.) If this was the fact, the application of the law of Ecuador as the national law of the husband amounted to giving retroactive effect to the naturalization, a result that the court is unlikely

There is only one instance in which agreements incidental to divorce proceedings are permitted in France, i.e. alimony settlements. The validity of such settlements is recognized in France;[102] this is important in the relations between the United States and France because of the American practice of adjusting such matters out of court, for instance by trust agreements.[103]

On the American side, the case of *Commissioner of Internal Revenue v. Hyde* is in point.[104] In this case, two American citizens residing in France had entered into a separation agreement incidental to a divorce action instituted in that country. There was a stipulation in the agreement that it was to be construed and interpreted according to the law of New York. In spite of this reference to New York law, it was held that the validity of the agreement should be determined "by the law of the place where it [was] made," i.e., French law.[105]

Conclusion

26. Several significant conclusions can be drawn from the foregoing comparison of the French and the American rules of conflict of laws. The rules lead to satisfactory results whenever marital property relations are defined in an antenuptial agreement which "speaks fully to the very point" and in which there is an express stipulation as to the applicable law. Yet instances where such an agreement is made are relatively rare. In the majority of cases, when no antenuptial agreement has been made, the differences between the two systems are relatively striking. The dis-

to have intended. It seems to the present writer that this decision may be compared to the highly controverted New York case of Gould v. Gould (235 N.Y. 14, 138 N.E. 490 (1923)) which granted conclusive effect in this country to a French divorce of American citizens resident in France, although domiciled in New York. There is, however, a serious difference between these two cases. In Gould v. Gould, the French divorce had been granted on the ground of adultery, a ground admitted in New York, whereas in the case of Rivière v. Roumiantzeff, the Ecuadorian divorce could not be compared to any corresponding French institution.

[102] See, e.g., Cass. July 28, 1903, Sombstay v. Ducloux, S. 1905.I.9; July 30, 1889, Danjard v. Worvitch, D.P. 1890. I. 428. See also Planiol and Ripert, 2 Traité Pratique de Droit Civil Français, 2nd ed. 1952, No. 638.

[103] See L. T. Bates, The Divorce and Separation of Aliens in France, 237. See also Commissioner of Internal Revenue v. Hyde cited *infra* note 104.

[104] 82 F. 2d 174 (C.C.A. 2d 1936).

[105] 82 F. 2d 176. The respondent contended that under the French law the agreement was invalid (which was true), but failed to prove the relevant French law, and his defense was set aside by the court. The latter refused to take judicial notice of French law. Public policy may prevent the enforcement in this country of foreign separation agreements. See e.g., Polyckronos v. Polyckronos, 17 N.J. Misc. 250, 8 A. 2d 265 (1939). In that case, an agreement valid under the law of New York was held contrary to the public policy of New Jersey and denied enforcement in the latter state.

tinction between movable and immovable property, fundamental in the United States, has little bearing on the French conflict of laws rule, according to which one law only governs marital property rights, irrespective of the movable or immovable character of the property. A similar situation exists with respect to the effect of a change in the parties' status subsequent to the marriage. While, under French law, the property relationship is unaltered by a change of status, the opposite view prevails in the United States with regard to the acquisition of movables after a change of domicil.[106]

The final draft of a codification of French private international law[107] repudiates the present solution of French case law based on the implied contract theory and imperatively determines the law applicable to marital property. Pursuant to article 37 of the draft, in the absence of an antenuptial agreement, the property rights of the parties are governed by their national law if they have the same nationality, and, if not, or if such law does not acknowledge the validity of the marriage, by the *lex loci celebrationis*, a rule which may lead to queer and impractical results since the place where a marriage is performed may be purely accidental.[108] When the marriage is celebrated by a diplomatic agent or a consular officer, the applicable law is, under the draft, that of the country of which such agent or officer is a national.[109] Although the draft, if adopted, would have the advantage of eliminating controversies, it would not greatly improve American-French relations. Neither of the criteria proposed in the draft coincides with those favored in this country, and no provision of the draft removes the opposition existing between the American and the French rules with regard to the effect of a change of status on the property rights of the parties.[110]

[106] In this connection, the view has been advanced (see A. K. Kuhn, Comparative Commentaries on Private International Law, 182; but see 1 Rabel, 343) that the French rule is preferable to the American because the former affords more stability in the property relationship than the latter. Yet, the determination of the applicable law by the French courts, often made *ex post facto*, would seem to lead to a contrary proposition. There is reason to believe that the French practice of giving weight to facts subsequent to the marriage in order to determine the law governing the relationship as of that date is more detrimental to the interests of the parties and their creditors than the American rule concerning the effect of a change of domicil upon property rights in movables acquired thereafter.

[107] Translated in K. Nadelmann and A. von Mehren, "Codification," 1 Am. J. Comp. L. (1952) 404.

[108] Such was the case in Dulles v. Dulles, *supra* note 37.

[109] See the text of this provision (as translated) in K. Nadelmann and A. von Mehren "Codification," 1 Am. J. Comp. L., (1952) 404, 422.

[110] The draft does not modify the present French rule, under which the relationship is not altered by a subsequent change of the parties' status, especially a change of domicil. With regard to naturalization in France, see article 40 of the draft and *supra* note 65.

27. However, as has been noted, in various respects American and French law can be reconciled and lead to results satisfactory in practice. Thus, there is no obstacle in French law to the application of the American doctrine of replacement,[111] and renvoi may also be of some assistance.[112] It is not inconceivable that the doctrine of *Depas v. Mayo*,[113] will prove useful for the protection of the interests of couples whose property relations are community property under French law and who remove to this country and settle in a separate property state. Cases like that of *Le Breton v. Miles*,[114] are also encouraging in that they reveal a tendency of certain courts to adapt foreign institutions to the legal framework of the forum. However, the problems of characterization which have been described above are a serious obstacle to the achievement of better American-French relations in this field, not to mention, of course, the public policy doctrine. In this respect, comprehensive comparative studies of marital property law in France and in the various states of the Union would be desirable.

[111] See *supra*, paragraph 12.
[112] See *supra*, paragraph 13.
[113] See *supra*, paragraph 12.
[114] See *supra*, paragraph 24.

KENZO TAKAYANAGI

Contact of the Common Law with the Civil Law in Japan

I

A CANDIDATE FOR A LAW DEGREE at the University of Tokyo must take courses in English, French, or German law, besides duly prosecuting his required studies in domestic law. This system of compulsory courses in foreign law goes back to the year 1887, when the law college of the same University was reorganized into four sections: English Law, French Law, German Law, and "Political Science." Those were the days when the study of law meant virtually a study of west-European law. Before this reform, the Kaisei Gakko, from which Tokyo University emerged, had been teaching English law since 1874. Two years earlier a law school was started by the Department of Justice where French law was taught. Among private law schools, some taught English law, while others taught French law. There was, however, no school teaching German law. The Japanese lawyers, therefore, came to be sharply divided into two antagonistic camps—the French and English schools. The most prominent foreign teacher of the French school was Gustave Emile Boissonade de Fontarabie who stayed in Japan from 1873 to 1895 and lectured at the Justice Department School of Law on natural law, criminal law, and various topics of the Civil Code. The most eminent scholar of the English school was an American, Professor Henry T. Terry, who came to Japan in 1877 and devoted the major part of his life to the study and teaching of common law at Tokyo University (1877–1884; 1894–1912). It may also be mentioned that a Member of our Academy, the late John H. Wigmore, then a young man fresh from the Harvard Law School, came to Japan in 1889 and taught Anglo-American law at a private school called Keio Gijuku (1889–1892). The Japanese scholars who studied in England taught

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For a supplementary survey of the literature on Japanese law in English and other Western languages, see Rabinowitz, "Materials on Japanese Law in Western Languages," *infra* at page 97.

English law, while those who studied in France lectured on French law. I have recently glanced over a list of lawbooks published during the period of twenty odd years since the Restoration of 1867 and was much impressed to find that they deal with English or French, but not Japanese law. The late Munroe Smith of Columbia, also a Member of our Academy, found an analogy between these strange decades of Japanese legal history and those centuries of European legal history which he characterized as the stage of theoretic reception of Roman law preceding its practical reception.

Professor Boissonade and other jurists of the French school generally were upholders of natural law. The lawyers of the English school, on the contrary, were under the influence of the antinatural law trends dominant in 19th century English juristic thought. If the French school advocated the universal validity of civilized jurisprudence, the English school stressed that the law is and ought to be an embodiment of national customs. The former were thinking of the French Civil Code, which had been held up as an excellent model and imitated by many other countries, while the latter were thinking of that inimitable system of English common law. However, in view of the strong national aspirations to abolish extraterritoriality, the English school as well as the French had to recognise the necessity of codification of law along occidental lines. It was codification as a political exigency which brought about the defeat of the English school. The French school had the *Code Civil* to serve as a convenient model, and in this respect they had a great advantage over the English school. Sir Harry Parkes, the British Minister, who was then the most influential among diplomatic envoys in Japan, did not, according to his biographer, like the idea of subjecting British residents to laws which were Continental in origin. He thought that English law should have been considered in preparing the new codes. The Japanese jurists of the English school might, for reasons of their own, have shared Sir Harry's views. However, the English common law was not in such form as to offer a convenient model. It is interesting to note Dean Wigmore's surmise that, if Sheldon Amos' Civil Code for England had become a reality, the situation might have turned out differently.

The civil code drafted by Gustave Boissonade was modelled after the French Civil Code, and the commercial code drafted by Hermann Roesler, a Hanoverian Liberal, is said to be more French than German. These two codes were to come into force in January, 1893. Jurists of the English school, however, did not look upon this victory of their opponents with philosophic complacency. They started a nationalistic outcry that it

would be a blot on national honor if codes drafted by foreigners were to come into force and that those codes disregarded national customs. For these and various other reasons, they advocated postponement. Nobushige Hozumi, a barrister of the Middle Temple, and a leader of the English school, published his scholarly essay on "Codification" at that time. His younger brother Yatsuka Hozumi wrote a sensational paper, entitled "*The Enactment of the Civil Code Sounds the Death-knell of our Traditional Virtues: Loyalty and Filial Piety.*" The English school scored a temporary success, and in 1892 a bill to postpone enforcement of the codes for four years passed the Diet. Nobushige Hozumi in a retrospect of the event compared this controversy on immediate enforcement or postponement, as conducted between the two schools in Japan, to the famous Thibaut-Savigny controversy in Germany. It is true that the arguments presented by lawyers of the English school remind one of Savigny and the Historical School. Inasmuch as the English school did not oppose codification as such, a closer analogy might be the controversy between the Romanists and Germanists in the last quarter of the 19th century. However, unlike the Germanists, who were experts in Germanic law, the Japanese lawyers of the English school advocating postponement, were not masters of the indigenous customs. Their opposition seems really to have been due to a sentiment of antagonism which they entertained towards the French school. It is interesting to note, therefore, that the young Wigmore who had been translating into English the decisions of Tokugawa Supreme Court, with the help of his Japanese pupils, wrote a series of articles in an English daily, favoring immediate enforcement. He compared provisions of the commercial code with the customs of old Japan to show that they are not incompatible with the indigenous customs—a feat which no Japanese jurist of those days could attempt. Their eyes were all directed towards western laws, and not like Wigmore's towards the laws and customs of old Japan.

The Commission appointed to prepare the Civil Code referred the drafting to a committee of three, Nobushige Hozumi, an English barrister, who had also studied in Germany, Masaakira Tomii, and Kenjiro Ume, both of whom had prosecuted their legal studies at the University of Lyon. They took native customs into account in the preparation of the Family and Succession Law, but otherwise they took the second draft of the German Civil Code as a model, although the influence of French and English law is observable here and there. The draft they prepared became law in 1896–1898. The Commercial Code and the Code of Civil Procedure were more exclusively German. It may also be noted that the Constitution of 1889 had been modelled after the Prussian constitution, Prince Ito

having followed the advice of Heinrich von Gneist (1816–1895), an eminent German publicist and well-known as a German authority on English public law. Thus a long and severe contest between the English and the French schools in Japan ended in the victory of the German school, a latecomer in the Japanese legal world. A person with a sense of humor might recollect an old Chinese proverb, "Bird and shellfish locked in fight are caught by a fisherman." Be that as it may, Japan since then became decidedly a member of the civil law family.

II

At the close of the 19th century, then, Japan became a country of the civil law. The system of Japanese law has come to be based on the traditions of the civil law. Thus not legal precepts alone, but the mode of legal thinking and argument of a Japanese lawyer are markedly civilian. The relations between the enacted law and judical decisions are conceived in civilian terms. To the common run of Japanese jurists, the Anglo-American law became more and more something strange and incomprehensible.

During the period between 1900 and 1945, the two most prominent institutions of the Anglo-American law—the jury and the trust—made their way into the Japanese law. The Jury Law of 1923 (which came into force in 1927) introduced the criminal jury. The Japanese jury system under this law deviates somewhat from its English prototype. No general verdict is allowed, and the verdict of a jury is strictly confined to the finding of facts, it being for the judge to decide "guilty" or "not guilty" on the bases of a jury's finding. The jury consists of twelve, but the unanimity principle is rejected in favor of the two-thirds majority rule. Political offences are not to be allowed to be put to jury trial. The jury system still remains in the statute book, but its employment has been suspended, without any sign of its revival.

On the Trust Law of 1922, I had the honor of reporting for the section of "*La Fiducie en droit moderne*" at the Congress of La Semaine Internationale de Droit held at Paris in 1937. It was enacted in view of the necessity for clarifying the legal status of trust companies which cropped up in great numbers in Japan before that date. The law is, however, so worded that it can be applied to other situations, but its application has come to be practically confined to legal relations governing trust companies.

It may be remarked in retrospect that Japanese civilians turned a cold shoulder on these two eminent Anglo-American visitors as dubious intruders into their familiar system. This shows how strongly civilian

traditions and modes of thought have become embedded in Japan in the criminal as well as in the civil field.

III

During the period of the Allied occupation of Japan between 1945–1951, there was an unprecedented inflow of American laws and institutions. This took place as a concomitant to the legal reform effected by American lawyers for democratizing Japan.

The importation of American laws and institutions was naturally most notable in constitutional and administrative law. But it took place in other fields also. The Code of Criminal Procedure has been radically changed so as to embody the Anglo-American principle of contentious procedure to replace the Continental inquisitoral or mixed procedure. The first three books of the Civil Code have not been much altered. The Family and Succession Law, has, however, been radically changed so as to undo the legislative endeavors of Hozumi, Tomii, and Ume in the nineties and to westernize the Code more thoroughly. The chapter on companies in the Commercial Code has been altered, and such American institutions as non-par-value stocks, cumulative voting, representative suits, have found their places in the amended Code. The American Anti-trust Law has been introduced wholesale. Labor law, with the enactment of the Labor Standards Law, the Labor Union Law and the Labor Relations Adjustments Law, has become quite Americanized. The occupation reformers seem in this respect to have been eager to embody the latest achievements of the New Dealers.

Let me briefly illustrate how Japanese civilians are managing the imported American institutions.

1. The Supreme Court

The powers and duties of the new Supreme Court of the American type are far more comprehensive than those of the old Supreme Court of the French type. It is vested with the power not only to deal with civil and criminal cases, but also with administrative cases, formerly left to an independent administrative court. It can determine the constitutionality of any law or official act. It has a rule-making power. It must perform certain administrative duties, formerly performed by the Department of Justice.

In compliance with the common law traditions, the number of judges was curtailed from some fifty in the old Supreme Court to fifteen. The judges, with the exception of the Chief Judge, sit in divisions, and only in constitutional and some specified cases do the fifteen judges sit in plenary

session. The system of young clerks attached to each United States Supreme Court Justice was modified into that of "investigation officials" (*chosa kan*) consisting of some twenty-five able fully-fledged judges as a body of subordinates under the judges. Their chief duties are to study and prepare for the judges reports on appeals to the Supreme Court. Signs are not lacking that Supreme Court judges will come to behave like administrative heads, relying mainly on the work of their subordinates —a system which would be totally repugnant to sound judicial traditions, either Continental or Anglo-American.

The Supreme Court is now a target of severe criticism. On the one hand, dissatisfaction is expressed with delays, and also with the deterioration of the quality of judicial decisions. The bar associations are strongly opposing all proposals for restriction on appeals to the Supreme Court for the purpose of obviating delays. It seems that they are intent on increasing the number of judges, so that the Court may function like the old Supreme Court. On the other hand, attacks are being made on the inefficiency of the Supreme Court as guardian of the Constitution; some advocate the establishment of a separate constitutional court as in Western Germany.

2. The Rule-Making Power

The new Constitution vests the Supreme Court with rule-making power, under which it determines the rules of procedure and practice and of matters relating to attorneys and public procurators, the internal discipline of the courts and the administration of judicial affairs.

The rule-making power is an institute of Anglo-American law unknown to Continental law. Japanese jurists are generally unaware of the important role which the rule-making power plays in judical administration in the common law countries. They adopt a literal or grammatical construction of the constitutional provision. At present, therefore, "rule" is interpreted as "detailed regulations." Civil and criminal procedure is regulated by law as heretofore, and only detailed rules thereunder are laid down by rules of the Supreme Court. The relations between judges, public procurators, and attorneys are unlike those in the common law countries, and public procurators and attorneys would not like to submit to the indignity of their being regulated by Supreme Court rules! So the object which the draftsman probably had in view in constitutionally guaranteeing the rule-making power to the Supreme Court has been frustrated.

3. Contempt of Court

In order especially to check obstructive tactics of communists in open court, an attempt was made to introduce the law of contempt of court

in facie curiae in Anglo-American law. The result, however, was a law which can hardly be compared with its English model. The contempt of court envisaged in the new law is an unlawful act but not a crime; the sanction is not a criminal punishment, but a sheer administrative penalty, the maximum period of detention being limited to 20 days, and the maximum amount of pecuniary penalty to 30,000 yen (approximately 30,000 francs or $85). Moreover, various forms of appeal are freely allowed. It may surprise the common law lawyers to hear that the main reason why it ended in such an ineffective weapon is that the bar do not like the introduction of a sharp weapon in the hands of the bench. They regard the judges as bureaucrats, upon whom they do not like to confer strong powers.

4. Habeas Corpus

The habeas corpus procedure has been imported but has not yet been often utilized. This seems to be chiefly due to ample remedies afforded to persons imprisoned on suspicion of a crime under the new Code of Criminal Procedure. However, from the enforcement of the Habeas Corpus Law in September, 1948, to the end of 1953, 95 habeas corpus cases are reported. There are a few cases involving the recovery of a child detained by persons unauthorized to have its custody, the release of persons kept in custody on the alleged grounds of insanity, and of persons detained by immigration officials pending deportation proceedings. But cases involving unlawful detention in criminal cases constitute a majority. In all, there are only three cases where release was ordered by the court. But there are many cases in which a voluntary release was made after a writ of habeas corpus had been issued, which made an order of release unnecessary.

5. Taxpayers' Suits

This peculiarly American proceeding prevailing in many states has been adopted in the Japanese Local Autonomy law. It is, however, practically becoming a dead letter.

6. Administrative Commissions

Various independent administrative commissions of the American type have been introduced in both the central and local governments. It is generally held that, even if the American situation might require this type of organization, the Japanese state of affairs does not call for such anomalies in administrative organization. Some of them have, therefore, been abolished, while others have become advisory commissions. How-

ever, some like the Fair Trade Commission are still functioning. Whether they will finally be incorporated into the regular departmental system remains to be seen.

7. Administrative Law

The Japanese Constitution provides: No extraordinary tribunal shall be established, nor shall any organ or agency be given final judicial power (Article 76, para. 2).

In pursuance of this provision, the Administrative Court of the Continental type was abolished, and all suits against the government came under the jurisdiction of ordinary courts. The academic theories of administrative law generally remain Continental as heretofore. The distinction between public law as the subordinating, and private law as the coordinating, law is still held as basis. The doctrines of mandamus, prohibition, or injunction against administrative officials have not generally been adopted, and will not be applied, except in the rare cases where such have expressly been provided for by law. However, it seems that the judges of the ordinary courts are inclined to protect private rights better than the judges of the administrative court under the old regime, sometimes even going too far by interfering with matters which should properly be left to administrative discretion. In the judicial review of quasi-judicial decisions of an administrative commission, the judges are inclined to try the case *de novo*. Unlike the common law lawyers, they are not used to distinguish sharply between law and fact. The power of the judges to find facts is regarded as the most important part of "judicial power," on which they have the final say under the constitutional provision mentioned above. This will probably be the case, even where the statute introduces the American rule of "substantial evidence" regarding judicial review, although it might be premature to venture a prediction on this point.

IV

Just a few words to conclude this short address:

(1) Despite an inflow of American institutions, Japan remains and will remain a country of civil law. The reception of English law in India took place under the British rule of more than a century, and Indian lawyers have been trained in the inns of court or Indian law schools of the English type. Indian lawyers, therefore, are just as much common law lawyers after as before independence. The reception of American law in the Philippines took place under American rule of nearly half a century. In the meanwhile, Philippine lawyers have been trained in American law schools

or Philippine law schools of the American type. Although the Philippine legal system is characterized as a mixed system with Spanish and American elements, the common law influence seems now to be predominant. The American occupation of Japan continued only for some seven years. During that short space of time, American occupation lawyers imported American institutions at a giddy speed, but just as speedily they packed up and left the country, leaving the future destiny of the institutions that they imported in the hands of Japanese civilians. No radical reform in legal education was or could be made in the interval, and the Japanese lawyers are trained in a civilian fashion today as heretofore. You know Frederick Maitland's well-known dictum, "Taught law is tough law."

(2) Many of the institutions were introduced without carefully weighing how they will work in Japenese society. Moreover, the drafting of the new legislation from the New Constitution downwards, having been sheer translation and that made in haste, is surely an affront to the canons of *elegantia juris* to which Japanese civilians are highly sensitive.

It is quite natural, then, that a movement to reform the Occupation reform has now started after the political pressure of the Occupation is gone. The amendment of the "MacArthur Constitution" is being studied by various bodies. The government has recently asked the Commission for the Investigation of the Laws to consider the amendment of the Civil Code, especially the Family and Succession Laws, and of the Commercial Code, especially the chapter on Company Law. A section of the same Commission is already considering the reform of the Judiciary and especially the Supreme Court.

(3) I watched the behavior of the good-natured American lawyers zealous in giving the Japanese the best laws they know. I also watched the behavior of Japanese lawyers who received and interpreted them. It seemed to me that both groups were interested solely in "legal precepts."

The former group seems to have thought that the precepts that they imported would be interpreted by Japanese lawyers in the same way as they would be interpreted by common law lawyers. As a matter of fact, Japanese lawyers are interpreting them usually in conformity with the civil law canons of interpretation. This state of affairs often reminded me of a report to one of our congresses which is entitled, "Hierarchy of Sources and Forms in Different Systems of Law," penned by my old teacher and our present president, Roscoe Pound. He stressed, if I remember correctly, that in the comparative law of the future, not only the bones and muscles, viz., the legal precepts, but also its life blood, viz., the legal technique, and its brains, viz., the legal ideals, must be compared in different systems of law. Both the American and Japanese lawyers in the

Occupation days should have listened to his wise warnings implied in this theory of comparative law.

(4) Lastly, but by no means least, the postwar reception of American institutions will have a salutary effect on legal science in Japan. At present, the study of American law is becoming a craze among young jurists, and you will find in Japanese law journals an abundance of translations and essays, good and bad, on various phases of American law, reminding one indeed of the "theoretical reception of west-European law" during the two decades after the Restoration. Again the reports of judges, public procurators, and practicing lawyers who visited America and England, show their keen interest in the new things they observed. If properly directed, this interest in Anglo-American law will open the eyes of Japanese jurists to the other great system of the world and will broaden their mental vision. Very recently through the generosity of the Ford Foundation, the Institute of International Education of New York started a six-year program of international co-operation between American and Japanese law faculties. This and other attempts to promote mutual understanding of the civilians and common law lawyers across the Pacific will, it is hoped, contribute to the progress of comparative law to which cause, indeed, our Academy is dedicated.

ROSCOE POUND

Comparative Law in Space and Time

IN SPEAKING OF COMPARATIVE LAW, I shall be thinking of something broader than is suggested by the English words. Perhaps I may put it best by saying that I think not of *droit comparé* merely but rather of *science comparée de droit.*

A developed system of law—and we are concerned with undeveloped systems only because and to the extent that they help us understand and treat scientifically of developed systems—a developed system of law may be looked at from any of four points of view.

In the English-speaking world since Austin, the point of view has for the most part been analytical. This method consists in examination of the structure, subject matter, and precepts of a legal system in order to reach by analysis the principles, theories, and concepts which it logically presupposes, and to organize the authoritative materials of judicial and administrative determination on this logical basis. It postulates or takes as an ideal, a body of logically interdependent precepts derivable from principles equal to providing for every case which may arise. This is no more than a postulate or perhaps an ideal. One need not say that there has never been anywhere any such all-sufficing, logically interdependent body of legal precepts. But the postulate has been useful to law teachers and jurists enabling them to make a body of law teachable and intelligible and to conform its precepts to reason. It is the oldest method of scientific treatment of a particular body of law. After comparing rules and comparing adjudicated cases in a particular legal system, the next step is to compare rules of different systems by analysis and seek to formulate general principles of law, that is, general authoritative starting points for reasoning. When this is done, there has begun to be a science of law. Cicero suggested something of this sort on the eve of the classical period of Roman law.

A historical point of view prevailed generally in the nineteenth century. Its method consisted in investigation of the historical origin and development of a legal system and of the institutions, doctrines, and precepts,

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looking to the past of the law to disclose the principles of the law of today, and seeking to organize the authoritative materials of judicial and administrative action on the basis of these historically developed materials. It postulates a continuity of development culminating in the authoritative legal materials of the time and place. As it was expounded in the last half of the nineteenth century, it proceeded upon a picturing of law as a progressive unfolding or realizing of an idea of right. It is the last of the three methods recognized in the last century to develop as a method of scientific treatment of a particular system. As a method of a general science of law it came after the philosophical method, as that method had obtained from the sixteenth to the eighteenth century and as a revolt therefrom. Gaius all but suggested something not unlike it in the classical Roman law. The pioneer is Cujas at Bourges in the sixteenth century.

A third point of view recognized in the last century was philosophical. From this point of view, the method of juristic science consists in study of the philosophical bases of the institutions and doctrines of a legal system and of its ideal element. It seeks to reach philosophical presuppositions of a system of law and to understand and organize its ideal element through philosophy. It postulates ideals of the end of law or purposes of the legal order with reference to which institutions, doctrines, and precepts may be measured and criticized. The philosophical method is the oldest and longest continued method of the science of law. It governed juristic thinking of the classical period of Roman law and dominated the legal science of the modern world from the seventeenth to the nineteenth century.

It should be noted that the three methods, as pursued in the nineteenth century, either presuppose the eighteenth-century law of nature (i.e. an ideal body of detailed legal precepts of which the law of the time and place is a more or less imperfect ascertainment) or presuppose a metaphysical idea of law as the realization of an idea. The law of nature is to be reached or the idea and its implications are to be reached by one of these three methods.

In the latter part of the nineteenth century, the metaphysical type of philosophical science of law was merged in the historical school. But the twentieth century has seen a revival of philosophy of law which has largely restored it to its old place in juristic science. Also this century has seen the rise of a sociological point of view. From this standpoint, juristic method consists in study of a legal system functionally, as a social instrument, as an agency of social control, and study of its institutions, doctrines, and precepts with respect to the social ends to be served. It presupposes that law is a specialized agency of social control.

Many, for example the late Professor Jenks, have named also a comparative method. This began to be urged in the last third of the nineteenth century and got currency in America through Lord Bryce's *Studies in History and Jurisprudence*. But the analytical, historical, and philosophical methods, as methods of a science of law, must be comparative. Comparative law as a comparison of the form of precepts and doctrines and institutions, as they are found in the law books of different systems of developed law, gives materials for analytical jurisprudence (giving jurisprudence its English meaning of *science de droit*), but is not in itself more than a basis for one type of science of law. So also investigation and exposition of the actual course of development of a particular legal system is not historical jurisprudence, it is legal history. This is the more true if the historian accepts the unique series interpretation of history. Legal history, and the universal legal history which Kohler urged, give materials for historical jurisprudence. Moreover, the English analytical and historical jurists, following Austin and Maine, used their methods comparatively from the beginning.

Indeed, as I have said elsewhere, a purely comparative method, apart from analysis or history, or philosophy would be barren. Savigny said wisely of a proposition that the task of the Continental jurist should be to compare the practical rules of the classical Roman law with those worked out on a Roman basis in the Middle Ages and in modern Europe that, "A few isolated cases excepted, the matter lies too deep to admit of being disposed of by such a selection between contrasted practical rules."

Looking in this way at Comparative Law, what, then, is to be compared? It comes down to what we mean by the term "Law."

In a sense, law is experience of adjusting relations of men and ordering their conduct in civilized society, developed by reason, and reason, how to make the adjustments and order conduct, tested by experience. But this is put in the way of the sociologists who are looking at social control as a whole and use the term law accordingly. For the present purpose, I shall not follow them in that respect. The jurist sets off law in the lawyer's sense as (1) a highly specialized phase (the legal order, *ordre juridique*, *Rechtsordnung*), or (2) a body of highly specialized instruments (the body of legal precepts, the technique of developing and applying them, and the judicial and administrative processes in which they are developed and applied). He regards these as a highly specialized phase and as highly specialized instruments of social control in the modern world in and by a politically organized society. The jurist sets these off from other phases and agencies of social control in such a society because he finds in legal history a gradual process of differentiation by which they are set off more

and more definitely until in the maturity of legal systems the differentiation becomes complete. In other words, jurists look primarily at their special subject and set it off for that purpose, while sociologists are looking at social control as a whole. Perhaps what seems to jurists a deep cleavage may seem to the sociologist, with a longer perspective, a mere scratch. But let us see. Take the case of the so-called sit down strike, much urged a decade ago. The claim to conduct such a strike was held a part of the inner order of certain powerful labor organizations. It was recognized and asserted by the authorities of those groups and was counted among their recognized jural values. But it did not comport with the inner order of our politically organized society. It was not recognized by the authority of that group. It was not counted among its jural values. It was not furthered by those who exercised the power of politically organized society. It was suppressed by them. To the lawyer, a distinction between the inner order and recognized jural values of groups and associations which are constrained to maintain that inner order and those jural values, subject to the scrutiny of and in subordination to the precepts established and recognized by a politically organized society, on the one hand, and the inner orders and recognized values which have behind them sanctions made effective by the organs of a politically organized society, on the other hand, is profound and generic.

As we shall see, this does not mean that I would limit the term "law" and hence comparative law to the narrow bounds of Austin's positive law. There is an ideal element in lawyer's law which is more significant for our purposes than claims or demands of particular groups which do not measure up to the reasonable expectations of men in a civilized society.

But even limited to the lawyer's sense, law is a word of more than one meaning. To repeat what I have said repeatedly in many connections, it is necessary to distinguish three meanings (as we use the term in English) which must be borne in mind in a full consideration of comparative law. One meaning is the legal order (*ordre juridique*, *Rechtsordnung*)—the regime of adjusting relations and ordering conduct by systematic application of the force of a politically organized society. Another meaning is the body of authoritative grounds of or guides to judicial decision and administrative action in accordance with which the legal order is maintained. A third meaning, which has had much vogue in America in the present generation, is to designate judicial and administrative processes by which the legal order is maintained and carried on.

Historically, the oldest and longest continued use of the term "law" in juristic writing is to mean the whole body of legal precepts which obtain in a given politically organized society. But we have here no simple concept.

Law in this sense is made up of precepts, technique, and ideals: A body of authoritative precepts, developed and applied by an authoritative technique in the light or on the background of authoritative traditional ideals. There is in any legal system a traditional technique of developing and applying legal precepts by which those precepts are eked out, extended, restricted, and adapted to the administration of justice. This technique of developing and applying the precepts is quite as authoritative as and no less important than the precepts themselves. No less authoritative, moreover, is a body of received authoritative ideals. This element in law comes down to a picture of the social order of the time and place, a legal tradition as to what that social order is and so as to the end or purpose of social control, which is the background of interpretation and application of legal precepts, especially in the application of legal standards, and is crucial in new cases in which it becomes necessary to choose from among equally authoritative starting points for legal reasoning.

Nor are we through when we have carried analysis thus far. The body of precepts itself is also complex. It is made up of rules, principles, precepts defining concepts, and precepts establishing standards.

Rule or rule of law is a term often used for every type of legal precept. But in a strict sense it means a legal precept attaching a definite detailed legal consequence to a definite detailed state of fact. It is the earliest type of legal precept and the only one known to the first stage of legal development. The codes of the beginnings of law get no further. They are made up of precepts of this type. Analytical jurists have often defined law as an aggregate of rules in this sense. Thus Bentham held that the word "law" could mean nothing more nor less than an aggregate of laws. But a system of law in the complicated social order and crowded world of today would achieve very little if this were the only type of precept in its legal armory.

A principle is an authoritative starting point for legal reasoning from which to seek rules and other starting points for legal reasoning by deduction. Principles are the work of lawyers. They organize experience of interpreting and applying rules or experience of advice to litigants or tribunals, or experience of judicial decision, by differentiating cases and putting generalized propositions behind the differences. They compare a long developed experience of decision in some field, referring some cases to one general starting point for reasoning and others to some other starting point, or they find a more inclusive starting point for a whole field. They come into the law with the advent of legal writing and juristic speculation so that the presence of this element as a controlling factor is the mark of a developed legal system.

Legal concepts are legally defined categories into which cases may be fitted so that, when certain situations of fact come within the category, a series of rules, principles, and standards become applicable. Legal concepts are chiefly the work of the systematizing and organizing activity of the maturity of law, and are for the most part the work of teachers, but get the authority of legal precepts. Examples in Anglo-American law are bailment, trust, sale, partnership, public utility. Principles and legal concepts make it possible to get along with many fewer rules and to deal with assurance with new cases for which no rules are at hand.

A standard is a measure of conduct prescribed by law from which one departs at his peril of answering for resulting damage or of legal invalidity of what he does. Examples are the standard of due care not to subject others to unreasonable risk of injury; the standards of reasonable service, reasonable facilities, reasonable rates imposed upon public service companies; the standard of fair conduct of a fiduciary; the standard of reasonableness in the law as to restraint of trade. Also the standard of use by a usufructuary in Roman law. In any complex social order, conduct requires to be measured by standards more than by rules in the strict sense. The rule attaches inevitably a threatened detailed consequence to a specified detailed state of fact. The standard has an element of fairness or reasonableness admitting of a margin of application to variations and degrees of facts. It is not reasonable to attempt to formulate a precept defining what is reasonable. At best, limits may be set, and reasonableness has to be referred to the authoritative ideal.

Thus a fruitful comparative law, even looking only at the precept element in legal systems of different lands, has to do much more than set side by side sections of codes or of general legislation.

No less must a fruitful comparative law subject the technique element of legal systems to comparative examination. Much has been written in comparison of the legal systems of Continental Europe with the Anglo-American common law, but there is still need of comparative investigation of the techniques of the respective systems as well as of techniques of the Continental systems in comparison with each other and of techniques in England, the several United States, Canada, and Australasia, in comparison with each other. For example, an article entitled "Reporting the Unreported" in the April, 1954, number of the Law Quarterly Review, raises a point which provokes inquiry into the practice in other common-law jurisdictions. Again, in contrast to the orthodox techniques of the English courts in the nineteenth century, American courts have been increasingly relying upon textbooks, cyclopedias, and annotations to cases and even articles in legal periodicals. A comparison of the practice of

courts in this respect in different jurisdictions in the common-law world would be instructive. The technique of interpreting and applying legislation has been different in Continental legal systems from what it has been in common-law countries. But with the rise of social legislation, a change has been going on at least in the United States. It is still generally true that common-law courts will not reason by analogy from statutes as they do from judicial decision. Yet the Workmen's Compensation Act has been influencing the law of torts in the state courts, and the Federal Employer's Liability Act and the Jones Act extending workmen's compensation to longshoremen have been affecting admiralty in the Supreme Court of the United States, even if state courts are refusing still to think of the statutes as to death by wrongful act and the Married Women's Act as part of the general law. Likewise, there is a place for comparison of the techniques of civil with administrative tribunals, and of courts with administrative agencies, and we have had much discussion in the United States of the techniques of military tribunals as compared with those of the civil courts. Even more there is room for comparing the techniques of criminal courts with those of juvenile courts, courts of domestic relations, and other tribunals applying individualized justice.

Some twenty years ago I urged comparison of ideals of law—of received ideals of the social and legal order, of the end of law, and so of what legal precepts should be and how they should be developed and applied in the light thereof. The Academy has been moving in this direction in reports on philosophy of law, and on natural law. But specifically there is room for comparative investigation of legal ideals—of received traditional ideals of particular legal systems in comparison with each other and in comparison with political ideals, economic ideals, and ethical ideals current in the time and place, which bear upon the interpretation and application of legal precepts. Moreover, these ideals call for examination not merely as they appear in the law in books but as they are manifest in the law in action.

Finally, comparative method is called for with respect to the judicial process and the administrative process both compared with each other generally, compared as to each in both Continental and Anglo-American law, and even compared in Roman, medieval, seventeenth and eighteenth century, nineteenth century, and contemporary law especially with respect to the effect of a crowded world and the rise of the service state upon each process.

So much for what is to be compared.

Now how are they to be compared? What is to be the measure or what are to be the measures of comparison?

Comparative method began under the influence of the law of nature school. There was one right rule, one rule of right and law, ascertainable by reason, on every question that could come before legal tribunals. It was the task of the lawmaker to formulate a body of rules of positive law to the model of the universal and immutable law of nature. It was the task of the jurist to assist the lawmaker by subjecting the legislative product to the scrutiny of reason and by working out the dictates of reason as guides for further or future lawmaking. Positive law was a system of legislative gropings for the right rule. Comparison of these gropings, comparison of rules in contemporary systems, rule by rule as if laid down at the same time, was what was required and was all that might be asked. Thus we had for a time only comparison of legislative texts but little or none of jurisprudence (in the Continental sense of judicial decision) or of doctrine. This type of comparative law is outgrown. Even from an analytical standpoint, an era of world economic unification, a time of complex urban, industrial society crowded in growing cities, demands comparison of rules, principles, techniques, and received ideals in time no less than in space, in times with other times, in relation to economic and political and cultural development.

Although the reign of the nineteenth-century historical school in the science of law came to an end early in the present century, there is abundant room still for true historical method. Comparative historical method in the last century suffered from a like handicap to that we have seen in the then analytical method. It was confined within the narrow limits of a rigid philosophical theory. Although the analytical jurists rejected natural law, they thought in terms of the eighteenth-century law of nature school. Although the historical jurists rejected the law of nature and held that law was something developed and growing, they held the course of development to the rigid lines of the Hegelian philosophy of history. Law was not made to order to an eternal pattern. It grew. But it grew by the inherent power of the idea to unfold or realize itself, and so in a fixed course which could not be affected by conscious attempts at lawmaking. History could show the earliest and simplest form of the idea which was realizing itself in the course of development of every legal institution and doctrine and precept and could chart the course of its unfolding. Thus, while the lawmaker could not in more than appearance make law, he could perceive from history, to some extent at least, the orbit of development. He could at any rate save the lawmaker from ambitious errors.

In the metaphysical historical doctrine of the nineteenth century, the idea which was realizing in the growth of the law was liberty—the

maximum of free individual self-assertion. Any lawmaking short of allowing the maximum liberty of the individual with the like full liberty of all others was incomplete. Any lawmaking in contravention of that maximum was futile. This seemed to accord with the dominant biological idea of evolution. Law was to order the Darwinian struggle for existence. It satisfied the expectations of an era of expansion and colonization and exploitation of the natural resources of new lands. So Comtian positivism, Spencer's theory of the progress from status to contract as the rational outcome of the universe, and Dicey's rule of law, were all in tune with Hegel's idea of history as the unfolding of the idea of liberty, and contributed to move juristic thought in the metaphysical historical direction. Even marked differences of geographical conditions between the old world and the new and between different areas of the new world had for a time little effect upon the law. The attempt for a time at a geographical interpretation of legal history was laid upon a Hegelian bed of Procrustes.

But all this has had to give way under the conditions of bigness, complexity, and mechanical development of every human activity in the societies in which the legal order must function today. Not only has the law been departing increasingly and consistently from the metaphysical historical path; even the one-sided class struggle of the Marxian economic interpretation, which itself had a Hegelian pedigree, has had to give way.

In a crowded world, the *ius utendi* and the *ius prohibendi* of the owner of land have been increasingly limited in the sixty-four years since I came to the bar. Today, the law knows of duties of care toward known trespassers, of duties with respect to trespassing children, and even in some states of duties toward trespassers who should be anticipated though not known to be on the land. Today, when contracts are not as a rule between two individuals bargaining upon an equality, we get a regime of standard contracts, standard provisions, and new doctrines as to frustration and judicial modification of contracts which belie Benthams doctrine that it is the function of law to maintain freedom and enforce the obligation of contracts.

The past three quarters of a century have seen more mechanical achievements, more harnessing of physical nature to man's use than all time before. In that time we have seen the coming of the telephone, electric light, electric power, electric street cars, trolley lines and trackless trolleys, automatic electric elevators, electric refrigerators, and electric heating replacing the steam heat which had replaced the fireplace and the coal stove. We have seen the coming of the phonograph, of X-ray, of the radio, and of television. We have seen the coming of streamlined passenger trains going one hundred miles an hour and freight trains a mile long. We have seen the advent of automobiles, now going at incredible speed,

and resulting auto trucks, auto buses, tanks, tractors and bulldozers. We have seen concrete and steel construction emulate the Tower of Babel. We have seen the coming of turbine engines and of the submarine. Above all, we have seen the coming of air transportation which has abolished distance. We have even come to see machines perform elaborate mathematical calculations and make arithmetic obsolete. What the dividing of the indivisible atom may yet lead to in the way of destruction of life and limb we have yet to see.

But all this has brought with it an enormous multiplication of types of injury to which the individual of this time is subjected in almost every aspect of his everyday life.

Moreover, a category of nervous injuries has arisen and has been much developed by advances in neurology, psychology, and psychiatry. When I came to the bar in 1890, except as an additional item of damages in case of physical impact, there was no legal liability for causing fright with serious consequences of even permanent nervous injury. This limitation upon liability was steadily given up in and after the first decade of the present century, and whether or not there has been physical impact, a difficult field of traumatic neuroses has come to vex courts and lawyers.

But apart from these new types of injury, the possibilities of injury today have not merely increased enormously, the circumstances of injuries have become vastly complicated. The farm wagon or the family horse and surrey on the highway in the nature of things could not have or give rise to accidents requiring untangling of difficult disputed issues of fact. There were no collisions of farm wagons at cross roads. Even if the farmer was drunk, the horses had sense and knew their way home. They ran into or ran over no one. A boy ten years old could drive the old-fashioned family horse and surrey and have no accident and endanger no one. When trains ran thirty miles an hour the conventional sign at the railroad crossing served well. There was ample time after stopping, looking, and listening to know whether a train was dangerously near. The carpenter worked mostly on the ground. But what he did in entire safety is now done at the mill, and he works on scaffolds putting up heavy frames and parts of a building, and accidents to employees at the mills and to carpenters from falls or collapsing scaffolds multiply. Indeed, we now have compiled statistics of the cost in life and limb involved in the erection of a building as cold-blooded and matter of course as the figures on cost of materials. Agricultural operations are carried on with tractors and complicated machinery so that there is danger lurking about the home farm. We read in the law reports today of huge orchards where hundreds are at work picking fruit and of scores of laborers at work picking tung nuts, and of injuries to these workers which could not have happened fifty

years ago. High explosives have come into use also. We read of them in connection with excavating for foundations, in road building, and in clearing land for cultivation. We read of explosions of trains and ships in transit, and even of supposedly harmless cargoes. Even worse are the injuries inflicted by high tension electric power wires of which we read in so many cases in the current reports. Electricity is brought into the home and raises new dangers there and even more in the streets creates dangers of which we read nothing in the law reports of the last century. Compare, as *loci* of accidents, the hand loom and spinning wheel with the textile mill, and livery stable with the garage. The general use of gasoline is another prolific cause of serious injuries.

Comparative search for the unfolding idea has gone the way of comparative search for the one right formulation of a precept of the law of nature. Yet this does not mean that we have been divorcing the comparative science of law from philosophy. There has been a notable renascence of natural law in the present century. A neo-Thomist scholasticism has become especially active since the last war. There has come to be increased recognition of an ideal element in the law, as a part of the authoritative guides to decision, rather than outside of the law. The existence of such an element in a body of law is not a new phenomenon. But it was repudiated by the analytical jurists of the nineteenth century.

Let me illustrate. How an ideal may be found and developed judicially and become authoritative was well brought out in the formative era of American law in working out a theory of applicability of English legal institutions and doctrines and precepts to the social and political conditions of the New World, and in finding criteria of interpreting and applying the provisions of written constitutions as the fundamental law of the land. That English legal precepts were to be the rule of decision in our courts had been provided in the colonial charters. After independence, we took it that they were still to be the rule of decision so far as applicable. But that the common law of England was the rule of decision in American courts so far as applicable and only so far as applicable was not a principle with any such historically given definiteness as the principle that harm intentionally caused is actionable unless justified, through which courts and jurists have been writing a new chapter in our law of torts in the last generation. In practice, the courts determined what was applicable and what was not applicable to America by reference to an idealized picture of pioneer, rural, agricultural America of the fore part of the nineteenth century, and this picture became part of the law. This is well brought out if we compare the way in which the operation of the first Married Women's Acts (abrogating the common-law incapacities of married women) was held down, as in derogation of the common law, with the willingness

of the courts to go beyond the letter of the statutes in giving effect to laws abrogating or altering rules of the feudal property law. The received ideal of an American society pictured a simple ownership of land, freely transferable, as the chief asset of a pioneer community, devolving at death in the same way in which personal property was distributed, and set free from the rules appropriate to a society ruled by great landowners. It pictured women as in the home, not about in the world entering into all manner of legal transactions. The one set of statutes conformed to the picture and was given liberal construction and the fullest effect. The other did not and was construed strictly and held down in its operation. Married Women's Acts were no more radical in their departure from the common law than the statutes which made over the descent of land. The difference in judicial treatment of these statutes by the same courts at the same time is not to be explained analytically by the common-law canons of interpretation.

Likewise, when American courts were called upon to perform the novel task of interpreting written constitutions and of judging of legislative acts with reference to constitutional texts—something they could not but feel was distinct in kind from the interpretation and application of a statute—they had no traditional technique at hand. It became necessary to give a content to abstract constitutional formulas exactly as the civilian had to give a content for modern purposes to abstract oracular texts of the Digest. Our traditional art of deciding had not been devised for such problems. Except for Coke's exposition of Magna Carta and of the legislation of Edward I, common-law lawyers had had little to do in the way of building a system of law upon a foundation of authoritative texts. Moreover, Coke's Second Institute, a common-law book of authority, was in great part a political tract in the contests of the lawyers with the Stuart kings. Some of the most significant provisions of our bills of rights were taken from the Second Institute and represent an attempt to give to the natural rights of man, as taught by the eighteenth-century law-of-nature school of jurists on the Continent, a concrete content of the common-law rights of Englishmen as taught by Coke and Blackstone. Yet this historico-philosophical content, derived from seventeenth-century England and eighteenth-century France, could not be used as it came to America for a legal measure of American legislative powers. Hence the courts fell back upon an idea of the "nature of free government" or the "nature of American government" or the "nature of American institutions." Nature, here, meant ideal. It all came to an idealized picture of the legal and political institutions of pioneer America.

Brought up on such ideas, when in the last quarter of the nineteenth century American courts were called upon with increasing frequency to

pass upon the reasonableness of social legislation in the transition from pioneer, rural, agricultural America to the urban industrial America of today, they turned to an idealized picture of the economic order of our formative era. They postulated an ideal society in which there was the minimum of government required for the general security in an agricultural community. In such a society, there was a maximum of free individual self-assertion. Hence they took this to be "liberty" as guaranteed in the Constitution. It followed that all limitation upon abstract free self-assertion, all derogation from a maximum of free self-assertion, was presumably arbitrary. With such an ideal of the social order and the end of law before it as the basis of applying the limitations of the Constitution upon legislative power, more than one court pronounced legislation forbidding the payment of wages by orders on a company store to be subversive of the liberty of the workman, reducing him to the position of an infant, a lunatic, or a convicted felon, and arbitrarily setting up a status of laborer in a world which had moved to a regime of contract.

What is significant is that these received ideals persisted in American law long after pioneer, rural, agricultural America was no longer the land in which the legal precepts in the Constitution were to be interpreted and applied. Although they are no picture of the urban, industrialized, thoroughly mechanized America of today, they had been so thoroughly received and had acquired such traditional authority that after half a century of struggle to shake them off they still make trouble for the service state of today. It should be noted that these persistent received ideals are in their actual role in the administration of justice as traditional principles received as part of the common law and so conceded a place in "positive law." They are often proving as persistently out of touch with the conditions in which they must be applied in the society of today as the ideals we have discarded. In truth, received principles of the unwritten law and received traditional ideals have proved equally obstinate in fighting a rearguard action in the progress of American law of today.

Of the three elements of a body of law, the technique element has been the most stable. Relatively it has changed little in the history of the common law since the seventeenth century. In spite of the social legislation and often radical doctrinal changes which have gone along with the rise of the welfare or service state, the rapid and revolutionary changes in the conditions affecting equality of bargaining power and risks of personal injury through industrial and mechanical development, and the effect of crowded communities upon the rights and liberties of landowners, the common-law lawyer has been obstinately holding to the traditional attitude toward statutes and strict views as to *stare decisis*. The precept

element is by no means so resistant to change. Studies of one hundred and fifty years of American law have shown that the average active life of a rule of law, for the greater part of the positive law, has not been much more than a generation. Whole areas of American positive law have become obsolete since I came to the bar in 1890. In these sixty-four years the old common-law procedure has been generally superseded, and the reformed procedure of the New York Code of Civil Procedure of 1847, which had been adopted in thirty states but retained the spirit and much of the detail of the procedure brought over from England, is giving way to a wholly new type of procedure governed by rules of court. The old equity procedure of the federal courts went out in 1938. The old technical law of real property as it stood in Blackstone's Commentaries has ceased to be significant and is no longer taught. The law of contracts is being rewritten before our eyes, and the law of the old nominate torts we studied when I was a student of law has lost significance following the development of principles from which a new body of rules have been and are still being derived. A new commercial code, the very idea an innovation, has been drafted and is in course of adoption and is rewriting much of what was rewritten a generation ago in the Uniform State Laws, which rewrote the main subjects of mercantile law, as they had been rewritten by Story some sixty years before, superseding the eighteenth century texts which had rewritten the custom of merchants as taken over by the courts in the seventeenth century.

Comparative law must compare precepts, technique, and received ideals as we find them in different eras of legal development no less than as we find them in different lands.

So much for what we are to compare and how we are to compare. It remains to ask for what purpose we are to compare.

Today, we are likely to approach such a question from a functional standpoint. What is the function of a comparative method? Shall we say it is to make the legal order operate so completely and effectively as it can be made to operate toward achieving and maintaining the ideal relation among men? But what is that relation? Are we to leave that question to the philosophers? As a philosophical question this has been debated since the Greeks. There has never been complete agreement among them. There seems little likelihood of our getting a final answer from them. But understanding of the practical task of social control in civilized society is something at which we may arrive more readily. Men have at one time or another been in general agreement during a particular era of legal development on what they were seeking to bring about by law. In a first stage of development, the end sought was merely to keep the peace.

Men sought to put down self redress, vengeance, and private war. The Greeks thought of orderly maintaining of the social status quo or at least of the society of the time and place in idealized form. Through the Roman law, this idea of the end of law came to the Middle Ages and endured until the era of discovery and colonization and abundant opportunity that marks the Modern Age. An idea of maintaining freedom of individual self-assertion limited only by the like free self-assertion of all others gradually took form and culminated in the nineteenth century. In the present century we have been giving that up, and there is no such general agreement as there was when English utilitarian, historical jurist, Kantian, Hegelian, Comtian positivist, and social individualist arrived by different philosophical paths at what was at bottom the same idea of the ideal relation among men. Such a consensus does not grow up rapidly. What the jurists of the next century will say there is no way of knowing. But what I seem to see in the juristic thought of today, put in many ways, is the fullest realizing of the reasonable expectations involved in life in civilized society which may be brought about through social control.

It might be inquired, however, whether we are bound to think of a process of ordering the satisfaction of conflicting and overlapping individual claims and demands upon a limited stock of the goods of existence. Must we think of a world in which, as the saying is, we each want the earth whereas there are many of us and there is but one earth? Perhaps the practical end I have suggested has in it too much of the Darwinian struggle for existence, of the biological thinking of the last century. It may be that the scientific progress, the magnifying of human control over physical nature in the atomic era in which mankind has succeeded in dividing the indivisible, will so multiply the goods of existence and so increase the means of satisfying claims upon them, that competing and overlapping demands or expectations will cease to be a problem of social control. But in a happy world of superabundance would there be any need for law? Or are there human expectations beyond satisfaction of material wants which would still call for social control? And if abundance is multiplied may individual demands upon it multiply in proportion? Such speculations are interesting but do not help toward the problem we must meet in the world as it is. At any rate, with no pretensions to be a philosopher, as a lawyer I can see a practical ideal to which we may fashion a measure of comparison in the systematic ordering of the satisfying of so much as we can of the whole scheme of reasonable expectations involved in civilized life with a minimum of friction and waste.

Comments

THE LOUISIANA STATE LAW INSTITUTE

Laws like faces grow old. Some age gracefully, adjusting almost imperceptibly to their new wrinkles. Others change so ungracefully that not even the most elastic fiction or the cosmetician's art can avoid maladjustment. The problem has always been: how can yesterday's laws be kept abreast of today and ready to serve tomorrow adequately? The answer, at least in part, has nowhere been better expressed than by Maitland's reminder that "to-day we study the day before yesterday in order that yesterday may not paralyse to-day and to-day may not paralyse tomorrow."[1] But how is this study to be carried forward most effectively? Louisiana has been working at the problem for almost fifteen years through the medium of a Law Institute, and her experience may hold some lessons for other jurisdictions.

Louisiana, unlike her sister states, began and continued her existence as a jurisdiction in which civil law ideas and concepts were dominant even if they did not pass unchallenged.[2] Among other things, this meant a written law, which took the form of a Civil Code and a Code of Practice adopted in 1825.[3] These codes were modelled on their French prototypes, but they also contained ideas taken from the Spanish law as well as from the Anglo-American common law. Except for a revision in 1870 which removed offending references to "slavery" from the Codes, they have stood for more than a hundred years without major overhaul. This does not mean that the Codes were not amended during this period. This has been done in a piecemeal fashion by express legislative action. It has also occurred through practice or by ignoring the provisions of the Codes. In certain matters, such as the law of corporations, insurance and mineral rights, legislation or jurisprudence has almost completely superseded the Code in importance.

Scholars became concerned lest the codes and the system of civil law of Louisiana be overwhelmed by the mass of legislation which had grown up outside the codes.[4] Belatedly, Louisiana came to realize that her line of ancestry to the civil law of Rome, France, and Spain, proud though it was, often as it

[1] 3 Collected Papers 439 (1911).

[2] The opposition of Governor Claiborne to the continuation of the civil law has been told elsewhere. Franklin, "The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana," 16 Tulane L. Rev. 319 (1942).

[3] There was an earlier Code of 1808 prepared by James Brown and Moreau Lislet. See Tucker, "Source Books of Louisiana Law," 6 Tulane L. Rev. 270 (1932).

[4] The debate was heated. See Ireland, "Louisiana's Legal System Reappraised," 11 Tulane L. Rev. 585 (1937); Daggett, Dainow, Hébert and McMahon, "A Reappraisal Appraised: A Brief for the Civil Law of Louisiana," 12 Tulane L. Rev. 12 (1937); Tullis, "Louisiana's Legal System Reappraised," 12 Tulane L. Rev. 113 (1937); Wigmore, "Louisiana: The Story of its Legal System," 1 So. L. Quar. 1 (1916); Stone, "Tort Doctrine in Louisiana: From What Sources Does it Derive?" 16 Tulane L. Rev. 489 (1942).

served as a theme for patriotic address and nostalgic reference, had been allowed to grow thin. Louisiana had produced no commentators. Neither had she, except in the very early years,[5] translated the great works of French and Spanish commentators through which her codes had been enriched, despite the fact that Louisiana lawyers could now read the originals only with difficulty and dictionary.[6] Almost too late, she began to take stock of her heritage and to seek to preserve it intelligently.

The resuscitation by Tulane University of the *Southern Law Quarterly* under a new name of *Tulane Law Review* as a journal devoted to codification and the civil law was a first step in the revival of interest in the civil law in Louisiana.[7] In this *Review* during the years 1932–1935 appeared an important series of articles written by Mr. John H. Tucker, Jr., entitled *Source Books of Louisiana Law*.[8] These were the beginnings. The next step came in 1938 with the establishment by the legislature of Louisiana of a State Law Institute and its designation as an official law revision commission, law reform agency, and legal research agency of the State of Louisiana.[9] Its general purposes were "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs, to secure the better administration of justice and to carry out scholarly research and scientific work."[10]

In form the Institute is similar to the American Law Institute, with which it has maintained close liaison. The Institute itself is composed of not more than 175 active members of the Bar who have been engaged in practice for at least ten years and not more than 50 junior members who have been at the Bar for at least three years but not more than ten.[11] It meets annually or more frequently if called into special session. The governing body of the Institute is the Council, which consists of 28 elected members and 28 *ex-officio* members.[12] On this Council are found representatives of the legislative,[13] judicial,[14] and

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[5] Before coming to Louisiana, Judge Francois Xavier Martin had translated Pothier's Treatise on Obligations and published it in 1802. Moreau Lislet and Careton published in 1820 The Laws of Las Siete Partidas Which are Still in Force in the State of Louisiana.

[6] See: Herold, The French Language and the Louisiana Lawyer, 5 Tulane L. Rev. 169 (1931).

[7] The Tulane Law Review began publication in 1929 as a continuation of the Southern Law Quarterly which had been published from 1916 to 1918.

[8] 6 Tulane L. Rev. 280 (1932); 7 Tulane L. Rev. 82 (1933); 8 Tulane L. Rev. 396 (1934); 9 Tulane L. Rev. 244 (1935).

[9] La. Act 166 of 1938. See Tucker, The Louisiana State Law Institute, 1 La. L. Rev. 139 (1938); Editorial, 13 Tulane L. Rev. 120 (1938).

[10] Sec. 4, La. Act 166 of 1938.

[11] The Eighth Biennial Report of the Louisiana State Law Institute to the Legislature of Louisiana, 1 May 1954, p. 7.

[12] *Id.* at p. 3.

[13] Chairmen of the judiciary committees of the Senate and House of Representatives of the Louisiana Legislature.

[14] Representatives from the Supreme Court, the Courts of Appeals, the District Courts, and the Federal Courts in Louisiana.

executive[15] branches of the government, of the State[16] and national Bar Associations,[17] of the American Law Institute[18], and of the faculties of law of universities in Louisiana. The active management of the work of the Institute is done by a full-time director.

The accomplishments of the Institute in its relatively short existence are amazing. Its first commission was the preparation of a compiled edition of all the *projets* and civil codes of Louisiana together with the corresponding articles of the *Code Napoléon* in translation.[19] This provided the Institute and the legal profession with a series of authentic texts upon which to work. Translation of the whole of the *Code Napoléon* was authorized, and work on a translation of Planiol's three-volume *Elementary Treatise on the Civil Law* was begun.[20] The Institute has from time to time in its biennial reports to the legislature recommended specific legislation for adoption,[21] but by far the greater portion of its work has been done on projects specifically referred to it by the legislature. Thus, in 1942 the Institute completed work on a Criminal Code, drafted at the request of the legislature and adopted by it in that same year. This modern criminal code has served widely as a model for other jurisdictions. In 1950, the Institute completed in accordance with legislative mandate its revision of all the statutes of the state. At the present time, the Institute is engaged in the final debates on the draft of a revised Code of Practice, and it is likely that Louisiana like France will soon turn to a revision of the Civil Code.[22] The Institute has prepared a *projet* for a new state constitution and has collected relevant materials on modern constitutions in preparation for an expected revision of the Constitution of 1921.[23] Still more recently a comprehensive study of the Louisiana law relating to oil and gas has been completed for the Institute.

In the preparation of specific projects, the method adopted by the Institute is similar to that in use by the American Law Institute. A reporter or reporters are chosen for the project, usually from the law faculties of the universities of Louisiana State, Loyola, and Tulane. These reporters are assisted by a legal research staff and are advised by a committee of experts in the particular field under study. Once a draft has been perfected by the reporters and their ad-

[15] The Attorney-General and Executive Counsel to the Governor of Louisiana.

[16] The President of the Louisiana State Bar Association and the Chairman of the Junior Bar Section.

[17] Any Louisiana members of the Board of Governors and House of Delegates of the American Bar Association.

[18] Any Louisiana members on the Council of the American Law Institute.

[19] Louisiana Legal Archives, vols. 1–3.

[20] Begun with Mr. Pierre Crabites as translator. Upon his death, the work has been undertaken by Judge Robert L. Henry, formerly member of the Egyptian Mixed Court of Claims.

[21] Its act of creation requires that the Institute "render biennial reports to the Legislature of Louisiana, and if it deems advisable to accompany its reports with proposed bills to carry out its recommendations."

[22] A mandate to undertake this work has already been given by Act 335 of 1948.

[23] Mandate was given for this work by Act 52 of 1946. The explanatory notes and studies which accompany the project are to be published in four volumes.

visers, it is submitted to the Council for discussion and revision. The draft is accompanied by the reporters' notes. After the Council has passed upon it the draft is then submitted to the membership of the Institute and upon receiving their approval, it is then transmitted to the legislature for appropriate action. Variations upon this procedure have been introduced for certain projects, but in general the pattern has remained the same.

The prime importance of the Institute is that thereby the state brings together in official capacity representatives of the teaching, judging, and practicing branches of the legal profession for regular discussion and for recommendation of proposed reforms in the substantive law as well as in its administration.[24] Liaison is maintained with the American Law Institute, the Commissioners on Uniform Laws, and the American Bar Association, as well as with law institutes in other countries. The Institute has been fortunate in having at its head, Mr. John H. Tucker, Jr., who not only commands the respect of the legislature and the legal profession but who also has long held a deep interest in the preservation of the legal heritage of Louisiana. By means of the Institute, the fabric of the heritage can be kept in sound condition.

FERDINAND F. STONE*

[24] As its President described the situation prior to the establishment of the Institute, "law revision and law reform are the results of careful preparation, thorough study and adequate discussion. For many years that has not been possible in Louisiana, due to the lack of time and a proper forum where judge, lawyer and legislator could meet for scholarly discussion of legal problems and proposed legislation." Tucker, "The Louisiana State Law Institute," 1 La. L. Rev. 139 (1938).

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THE RIGHT TO STRIKE OF CIVIL SERVANTS AND EMPLOYEES IN THE PUBLIC SERVICES, UNDER THE FRENCH CONSTITUTION OF 1946

The right to strike of civil servants before 1946. From the beginning of the present century, the principle has been established by the *Conseil d'Etat*, the court of final appeal in all disputes involving the administration, that civil servants have no right to strike.[1] This right, which even in the case of workmen was not governed by any legislative provision, was refused state and municipal employees as being incompatible with the nature of the functions discharged by the public services.[2] According to the principle laid down by uniform decisions of the *Conseil d'Etat*, these services should function without interruption. Hence, it is inconceivable that the very persons appointed to ensure their operation should be allowed to interrupt them, even temporarily, by resorting to a strike. While this ruling of the Conseil, according to French experts in administrative law, constitutes an exception to the freedom of labor and of industry on which the right to strike is based, public servants are not in position to complain, because they have accepted this special status in accepting office.[3]

Limitation of the right to strike of public utility employees before 1946. Under the provisions for military draft of individuals, it has been possible in fact to prohibit strikes in private enterprises affected by public interest. The most celebrated precedent was furnished by the strikes involving a railroad company in 1910. The military laws at the time, as at present, enabled the government to mobilize railway employees for a period of military service to be performed at their usual place of work. The government utilized this power to force the strikers to operate the trains. On complaint of the parties, the *Conseil d'Etat* adjudged that the government had not abused the powers conferred upon it, in mobilizing the employees of a private service, the uninterrupted operation of which is indispensable for national security and order.[4] As a result, while employees in public utilities were legally authorized to strike, the government had at all times the possibility of terminating the strike by resort to a military draft.

The Preamble of the 1946 Constitution. The preamble of the 1946 Constitution provides in paragraph 6 that "the right to strike is recognized subject to the laws which regulate it." During the parliamentary discussion of this provision, long debates took place contemplating the exemption of civil servants from

[1] Arrêt, 7 août 1909, Recueil Sirey 1909.3.45, Recueil Dalloz 1911.3.17; likewise, arrêt, 6 septembre 1910, Recueil Dalloz 1912.3.131.

[2] More recently, but before the Constitution of 1946 came into effect, arrêts, 22 octobre 1937, Recueil Dalloz 1938.3.49; 18 avril 1947, Recueil Sirey 1948.3.33; see also arrêt, 24 juin 1921, Recueil Lebon 1921, 260.

[3] On the general principles controlling the civil service, *cf.* Marcel Waline, Traité élémentaire de droit administratif (1952) and A. de Laubadère, Traité élémentaire de droit administratif (1953) 655 *et seq.*

[4] Arrêt, 18 juillet 1913, Recueil Sirey 1914.3.1, Recueil Dalloz 1917.3.81.

the application of this constitutional guarantee of the right to strike. Ultimately, all amendments presented with this in view were rejected, the authors of the Constitution being of the opinion that the laws envisaged in the preamble would give complete latitude to regulate, limit, or prohibit strikes in the public services.[5]

However, no parliament since 1946 has had the courage to vote a general law respecting strikes of civil servants and public utility employees. The two special laws prohibiting strikes of police and security agents[6] are not applicable to other employees of the state or local administrations.[7] The question thus is to determine whether the preamble precludes application of the established principles of the decisions of the *Conseil d'Etat* respecting strikes of civil servants. In the absence of a special law, can civil servants demand recognition of the right to strike contemplated by the Constitution?

Argument from the sociological background. When the question came before the *Conseil d'Etat* in 1950, certain sociological factors had developed since the beginning of the present century, so as to change the general character of the public services. One essential factor was the notable increase in the number of civil servants, most of whom occupied humble posts with nothing in their work to distinguish them any more from the workers in private enterprises. The majority of civil servants in fact today discharge no function involving the exercise of the executive power of the state. They are simple secretaries, janitors, librarians, etc. Their relatively low wages place them in the same social category as the majority of workmen and white-collar employees.

On the other hand, as a result of the nationalizations and the extension of governmental intervention in industry and commerce, numerous enterprises, formerly private, have acquired the status of public (governmental) enterprises. It is evident that, although their employees sometimes have acquired civil service status,[8] they have experienced no change in their employment and perform the same services as formerly were assigned to workmen or office employees. As their social status has not changed, it is difficult to understand that they should now be deprived of the right to strike, which they possessed previously and which is generally accorded to individuals performing analogous work in private enterprises.

Another important change in the sociological background arose from the fact that after the war civil servants acquired the right to form unions, whereas

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[5] V. R. Pelloux, "Le préambule de la Constitution," Revue de Droit Public 1947, 375; J. Rivero—G. Vedel, "Les Problèmes Économiques et Sociaux et la Constitution du 27 octobre 1946," 31 Collection Droit Social (1947).

[6] *Cf.* lois des 27 décembre 1947 et 28 septembre 1948.

[7] *Cf.* the discussions concerning the preparation of these laws by Gazier, Droit Social 1950, 319.

[8] Even in the case of nationalized enterprises, all agents are not civil servants. In effect, their status varies from one enterprise to another. *Cf.* F. Luchaire, "Le statut des entreprises publiques," Droit Social 1947, 253 *et seq.*; Waline, *loc. cit.*, 380 *et seq.*

this right had been consistently refused to them under the Third Republic. Not only are civil servants now authorized to associate in unions: delegates of the unions are even called upon to collaborate with the higher civil servants in decisions affecting recruitment and operation of the service.[9] Is it not paradoxical that a class of persons should be able to enjoy the right of unionization and at the same time be deprived of the right to strike?

The new ruling of the Conseil d'Etat. In the case adjudicated by the *Conseil d'Etat* on July 7, 1950, the government, on the strength of the established *jurisprudence* of the *Conseil*, had taken disciplinary action against the higher civil servants of a prefectoral service for having participated in a strike expressly prohibited by ministerial instructions and circulars. The officials in question asserted before the *Conseil d'Etat* that these instructions, as well as the disciplinary measures taken against them, were illegal, being contrary to the right to strike which was assured them by the Constitution. From the point of view of legal technique, therefore, the *Conseil* had to decide whether the government had abused its regulatory and disciplinary power with respect to these civil servants.[10]

Before entering upon this question, the *Conseil* had to pronounce on the question whether paragraph 6 of the preamble to the Constiution had created a rule of positive law guaranteeing the right to strike, or whether it merely contained a directive addressed to the legislator.[11] French doctrine is divided on the question of the positive force of the rules of the preamble to the Constitution, and particularly of paragraph 6.[12] The *Conseil d'Etat*, adopting the viewpoint of the majority of the writers, decided that paragraph 6 directly established and guarantees the right to strike.

Admission of this constitutional guarantee of the right to strike, even for civil servants, nevertheless would not have prevented the *Conseil d'Etat* from deciding, as it had previously done, that the principle of uninterrupted functioning of public services had priority over such general right to strike and that, in consequence, the administration had been justified in taking severe measures against the strikers. The legality of such a decision was not in doubt.[13] However, the government *commissaire* at the *Conseil d'Etat*, functioning as solicitor general, pointed out that in view of the transformations of social climate and structure and of public service during the past thirty years, such a decision would not be understood by anyone and would risk not being followed and accepted. In particular, he wrote:

[9] *Cf.* Waline, *loc. cit.*, 370 *et seq.*

[10] Droit Social 1950, 317; Recueil Dalloz 1950, 69, *id.* 1950, jurisprudence, 539; Recueil Sirey 1950.3.109; Revue Administrative 1950, No. 16.

[11] It is to be remarked that, under the first alternative, the question arises whether the effectiveness of this provision is not subordinated to the promulgation of the laws therein contemplated. *Cf.* Laubadère, *loc. cit.*, No. 1359.

[12] *Cf.*, for example: R. Pelloux, *loc. cit.*, 395; G. Vedel, Manuel élémentaire de droit constitutionnel, (1949) 327 *et seq.*; M. Prélot, Précis de droit constitutionnel (1947) 336.

[13] More recently, J. Rivero, "Les grèves d'août 1953," Droit Social 1953, 517.

"Maintenance of your established *jurisprudence* in particular would sanction improperly in our view, a fundamental divorce between law and morals, between rule and reality. Strikes constitute a fact representing a profound political and social need of our age. This is attested by its recognition in the preamble to the Constitution, which at the same time gives it further stimulus. . . . Considering only the strikes of civil servants, they are becoming increasingly frequent and banal. The moralist and the citizen may deplore this. The judge is obliged to acknowledge it. For, to limit oneself without distinction to condemnation of any strike in the public services, is this not to proclaim a mere prohibition on principle, which, by its absolutism, loses all constraining force? . . . Provisions of a law, too rigid and theoretical, may without difficulty remain a dead letter, but not the principles of your *jurisprudence*. . . ."

The *Conseil d'Etat* adopted the view of the government *commissaire*.[14] It recognized that the guarantee of the right to strike by the Constitution no longer allows the principle to be maintained that any strike of civil servants is illegal as being incompatible with the rule of the continuous functioning of public services. On the other hand, realizing that certain public services cannot be arrested, even temporarily, without compromising the security of the country or public order, the *Conseil d'Etat* holds the government entitled to take the necessary steps to assure uninterrupted service. This right derives from its general regulatory power, and implies the right to enjoin strikes in certain services or by certain classes of civil servants.

In the absence of legislative regulation of strikes, as contemplated by the preamble to the Constitution, it is thus necessary in each individual case to determine whether, in view of the nature of the services involved, the government has abused its power of regulation by prohibiting the strike, which, in principle, is admitted by constitutional law. In accordance with the tradition of French administrative law, the final decision of this question is the province of the *Conseil d'Etat* in its capacity as judge of the abuses of authority which may possibly be committed by the public administration. It was under these conditions and for the reasons just set forth that the *Conseil* decided: "In the present absence of (legislative) regulation . . . it is for the government, responsible for the proper functioning of the public services, itself to determine, *under the control of the judge* (i.e., the *Conseil d'Etat*), in respect of these services, the nature and extent of the limitations (on the right of civil servants to strike). . . ."

Comment on the decision of the Conseil d'Etat.[15] It has been pointed out in the literature that the decision of the *Conseil* leads to the most complete uncertainty of law. Indeed, only after the decision of the *Conseil* in a particular case, will one know whether the administrative prohibition of the strike was lawful. The uncertainty will be even greater, as the *Conseil* has not defined

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[14] Traditionally, the arrêts of the Conseil d'État do not contain detailed statements of the grounds for decision (*motifs*). The underlying reasons for the decision have to be ascertained in the conclusions of the *commissaire* of the government, as published in the legal reviews, or elaborated by the text writers.

[15] *Cf.* the notes published in the passages cited in note 10 *supra*, thus Waline, *loc. cit.*, 370; Laubadère, *loc. cit.*, No. 1359; J. Rivero, *loc. cit.*, 517.

the standards according to which it will judge the legality of the prohibition. In effect, it has been satisfied to state that it will reach its decision taking account of the public interest, and this notion is quite vague and capable of many interpretations.[16]

Valid as this criticism may be, it is, however, only partially justified. In effect, supposing that departmental instructions are issued by the government, regulating the right of civil servants to strike, it is permissible to attack these before the *Conseil* without waiting for the outbreak of a strike or administrative sanctions against insubordinate civil servants. In any event, even when the *Conseil* has pronounced on the legality of an instruction or regulation of this type, the interested parties nevertheless retain the right to appeal before the *Conseil* against sanctions subsequently taken against them.

More serious, because of its more fundamental implications, is another observation on the decision of the *Conseil* of July 7, 1950. In reserving to itself final decision on the lawfulness of a strike of civil servants, the *Conseil d'Etat* assumes in fact the role that paragraph 6 of the preamble to the Constitution has reserved to the legislator. It is the function of the legislature and not of the administration nor of the *Conseil d'Etat* to establish the rules within which the right to strike is exercised. The force of this thesis is such that the *Conseil d'Etat* could have adopted it, by deciding that it was not its province to declare unlawful a strike which is not forbidden by law, thus refusing to take the place of the legislator. It was for practical reasons and on account of higher interests of the nation that the *Conseil* has not adopted this attitude, completely justified by the Constitution.

In effect, two facts were certain at the time when the *Conseil d'Etat* was called upon to make its decision in principle, and they have remained true during the years following the decision. On the one hand, it is undeniable that there are services and administrations in which a strike could not be tolerated without compromising the security and welfare of the nation. On the other hand, parliament has not the slightest intention of undertaking the task imposed upon it by paragraph 6 of the preamble to the Constitution, and of regulating the right to strike. As has been justly noted, regulation of strikes is for parliament a "tabu," which must not be touched.

Now, if legalistic scruples had kept the *Conseil d'Etat* from acting as a substitute for the defaulting legislature, only two solutions, equally unsatisfactory, were possible. It could in effect maintain the former *jurisprudence*, according to which the principle of continuity of public services forbade strikes in any administration whatsoever; but in this case its decision would not have been accepted by public opinion, as the government *commissaire* justly observed. The other solution consisted in admitting the lawfulness of any strike because the legislation contemplated by the Constitution was lacking; in this case, there was the risk of a paralysis of many services whose operation could not be

[16] We have shown elsewhere, (14 Revue du Barreau de la Province de Québec (1954) 331, 356 *et seq.*) that in place of the uncertain and vague concept of public interest, it would be more logical and convenient to take the vital national interests as the standard.

interrupted without endangering the life of the nation. The *Conseil* therefore acted wisely in choosing an intermediate solution, even if it thus becomes, without seeking to do so, the substitute for a legislature that systematically avoids its functions.[17]

It is not our purpose to seek the principles of a satisfactory legislative regulation concerning strikes in the public service. However, it is pertinent to note that certain authors have proposed a distinction between so-called civil servants "of authority" who actually exercise executive and regulatory power, and subordinate officials. While the right to strike should be denied the former, it would remain accessible to the latter.[18] True, delimitation of these two categories could be only arbitrary. But the decisive argument against such a regulation is furnished by the following consideration: a strike of librarians or municipal theater directors scarcely compromises the public interest, whereas public health may be gravely affected by a strike of orderlies in a municipal hospital or of gravediggers in a cemetery. This shows that it is not so much the grade or authority of the civil servant, as the nature of the service, which should govern the permissibility of a strike.[19] This observation leads to the problem of strikes of civil employees working in public utilities, viz. private enterprises of public interest.

The right to strike in public utilities. According to the French administrative tradition, enterprises of public interest (public utilities) have been either enterprises exploited directly by governmental or local administrations, and in this case they were treated as true administrations, or concessionary enterprises.[20] The latter were private businesses, the operation of which was regulated and supervised by the government. Most of the agents of these concessionary services were civil employees. Therefore, in principle they had the right to strike. But in fact, as is shown by the case of the railroad strike mentioned above, this right was limited by laws which permitted them to be mobilized in their posts.

Since the thirties, the status of enterprises of public interest has been much more diversified.[21] In effect, new categories have been added to those already mentioned; nationalized enterprises of which certain agents are civil servants, and other employees and civil workmen; commercial enterprises belonging wholly to individuals but whose regular operation is in the public interest either because of the material importance of the enterprise (on which thousands of workmen depend) or because of the services furnished (dairies, bakeries, etc.).

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[17] This recognition of the right to strike solely applies to strikes which seek to enforce professional claims. It does not apply to political strikes, P. Durand, "Le régime de la grève politique," Droit Social 1953, 22 *et seq.*

[18] *Cf.* Viet-Vaux in Revue Administrative 1950, 371 *et seq.*

[19] On the application of this *jurisprudence* of the Conseil d'État to the strikes that occurred in August 1953, see J. Rivero, "Les grèves d'août 1953 et l'évolution du droit de grève des agents publics," Droit Social 1953, 517 *et seq.*

[20] Waline, *loc. cit.*, 380 *et seq.*, Laubadère, *loc. cit.*, No. 1209.

[21] *Cf.* especially the classification in Laubadère, *loc. cit.*, No. 1131, Luchaire, *loc. cit.*

This is to say that, while an interruption in the operation of certain services no longer affects the public interest (museums, public libraries, etc.), there is a growing number of establishments, private, semi-private, or governmental, whose uninterrupted operation is a matter of public interest. Now, it is not subject to doubt that private civil employees and workmen working under a labor contract in such establishments, in principle have an unlimited right to strike.

In fact, however, the survival of a wartime law permits the government also in these cases to prevent the breaking out or the continuation of a strike which is harmful to the public interest. As early as 1938, the decree of July 11, 1938, authorized the drafting by the government of persons judged indispensable for the preparation of the national defense.[22] The chief provisions of this decree have been renewed repeatedly, and the decision of the *Conseil d'Etat* of October 28, 1949, establishes that they are now still in force.[23]

By the application of these provisions, the government may order the agents and employees of private or public enterprises to resume their regular work and thus terminate a strike already in progress, when the national interest requires it.[24] It is the duty of the *Conseil d'Etat*, upon appeal by the interested parties, to decide whether the administration has abused its powers in using such a draft to break a strike. Thus far there has been no decision unfavorable to the government. This does not prove partiality on the part of the *Conseil*, but rather the caution with which the government resorts to the powers granted it by the 1938 decree. The principal cases submitted to the *Conseil d'Etat*, which on each occasion approved the governmental action, have involved strikes of the employees of the national company d'Electricité of France, concessionary enterprises, national theaters, etc.[25] It is interesting that the decree of 1938 applies not only to employees and workmen, but also to the heads of businesses and self-employed persons. Thus, the government has been able, in the interest of the inhabitants of a city, to prevent a strike of bakers there situated.[26]

These few remarks on the right to strike in the public services and in establishments of public interest support the conclusion that the right to strike guaranteed to all by the 1946 Constitution in fact is subject to exceptions whenever the national interest or the public order is in danger. To be sure, strikes are forbidden by legislation only to agents of the police. But the government possesses, by virtue of the *jurisprudence* of the *Conseil d'Etat* and the provisions of the decree of 1938, wide powers to prevent or stop any strike harmful to the

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[22] On this decree, see P. Durand-Vitte, Traité de Droit du Travail, 1951, tome II, No. 199; Doucet, Contribution à l'étude des réquisitions civiles (thèse, Lyon, 1942).

[23] Droit Social 1950, 51.

[24] *Cf.* the leading arrêt, 5 décembre 1941, Recueil Sirey 1942.3.25.

[25] *Cf.* arrêts, 10 novembre 1950, Recueil Sirey, 1951.3.10; 4 mai 1951, 29 juillet 1951, et 20 avril 1952, Revue Administrative 1952, 551 et 558; 25 janvier 1953, Recueil Lebon, 1953, 55, and note 24 *supra*.

[26] Arrêt, 28 octobre 1949, Droit Social 1950, 50.

public interest.[27] The judicious exercise by the *Conseil d'Etat* of its power of control over governmental acts guarantees that the government does not use its rights in an arbitrary or abusive manner. In effect, the impartiality of the *Conseil d'Etat* and its understanding of the problems have been, for more than a century, the foundation and guarantee of the effective functioning of the French administration.

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[27] On the use of these powers during the strikes of 1953, see J. Rivero, *supra* note 19.

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MATERIALS ON JAPANESE LAW IN WESTERN LANGUAGES

While a reading of Professor Takayanagi's article will undoubtedly arouse interest in Japanese law, inaccessability of the material stands as a serious obstacle in the path of the scholar or practitioner interested in working in this field. As one might surmise, there is a paucity of literature in Western languages, and much of what little exists is to be found only in exceedingly obscure sources. A further problem of major importance is that the materials are in large measure of historical value; they will in no sense facilitate the acquisition of knowledge concerning current or recent developments. Nevertheless, there is a small body of literature on more or less current topics, so that one interested in pursuing some of the current or more historical topics raised by Professor Takayanagi will probably find literature in both areas which will be of help to him.

Two notes of caution are in order. The bibliography given here confines itself to the major fields of law as embodied in the principal codes; the relatively few items which exist on ancillary matters have not been incorporated. Second, the bibliography does not purport to be exhaustive; many of the earlier items to which citation has been found have not been located, and such items are excluded from the list. Similarly, items which have been deemed too trivial to be of interest have been excluded. With these introductory words of caution in mind, we may proceed to an examination of the literature.

The Pre-modern Period. The best work on the period prior to the Restoration of 1867 is that of Wigmore.[1] It is a monumental work worthy of greater attention than it has received to date. Other works on this period relate primarily to legislation. We possess translations, with commentaries, of some of the major items of legislation in the Tokugawa Period, the period immediately prior to the Restoration.[2] A few studies have been made of the law of even earlier historical periods.[3] A recent article by Henderson synthesizes the basic premises

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[1] Wigmore has recounted his experience in working with the material in "Editing an Era's Archives of Justice in Japan," 21 A.B.A.J. (1935) 731. As yet only a small portion of his manuscript has been published. Included in the published material is Law and Justice in Tokugawa Japan: Part VII (Persons) (1943); Law and Justice in Tokugawa Japan: Part II (Contracts) (1941); "Materials for the Study of Private Law in Old Japan," 20 Transactions of the Asiatic Society of Japan [hereinafter T.A.S.J.] (Supp. 1892) 1; "Notes on Land Tenure and Local Institutions in Old Japan Edited from Posthumous Papers of Dr. D. B. Simmons," 19 T.A.S.J. (1891) 37. His admirable summary of premodern case law and legislation is contained in A Panorama of the World's Legal Systems (1936) at 457 *et seq.* Kanazawa, "Grundlagen der japanischen Rechtsgeschichte," 31 Archiv für Rechts- und Sozialphilosophie (1937) 38, treats of the premodern and carries over into the modern period.

[2] Grisby, "The Legacy of Iyeyas," 3 T.A.S.J. (pt. 2, 1875) 137; Gubbins, "The 'Hundred Articles' and the Tokugawa Government," 17 Transactions of the Japan Society of London (1918–20) 128; Hall, "Japanese Feudal Law; The Tokugawa Legislation—The Edict of 100 Sections," 41 T.A.S.J. (1914) 683; Hall, "Japanese Feudal Law, Part III: The Tokugawa Legislation," 38 T.A.S.J. (1911) 269.

[3] Hall, "Japanese Feudal Law, Part II: The Ashikaga Codes," 36 T.A.S.J. (pt. 2 1908) 1; Hall, "Japanese Feudal Law: The Institutes of Judicature," 34 T.A.S.J. (1906) 1; Sansom, "Early Japanese Law and Administration," 11 T.A.S.J. (2d Ser. 1932) 117.

of Tokugawa law and is essential to anyone seeking to understand the philosophy of law in Japan prior to contact with the West.[4]

General Literature on the Modern Period. The fascinating subject of the reception of Western law has been dealt with by several writers, though it has not as yet received anything like definitive treatment in Western languages.[5] De Becker has written a general survey of the inception and content of each of the principal codes with the exception of the Criminal Code.[6] The revision of Japanese law following World War II has been dealt with by Blakemore[7] and Opler.[8] An invaluable source of data on legal developments during the Occupation is the Official Gazette which was published in English translation from 1946 to 1952.

Constitutional and Administrative Law. Aside from the classic commentary on the Meiji constitution by Ito,[9] studies in constitutional law are relatively slender contributions of no major importance.[10] Translations of the postwar document may be found in several sources, none of which includes commentary.[11]

Oda has presented a comprehensive study of prewar administrative law.[12]

[4] 27 Wash. L. Rev. (1952) 85.

[5] Ruete, Der Einfluss des abenländischen Rechts auf die Rechtsgestaltung in Japan und China (1940) is the most detailed. Friedrichs, "Zum japanischen Recht," 10 Zeitschrift für vergleichende Rechtswissenschaft [hereinafter Zeit. Ver.] (1892) 351 and Kohler, "Studien aus dem japanischen Recht," 10 Zeit. Ver. (1892) 376, deal with the Tokugawa Period and the beginning of modern law in the early Meiji Period. Professor Takayanagi's Reception and Influence of Occidental Legal Ideas in Japan in Western Influences in Modern Japan (Nitobe ed. 1931) will also be helpful. Of less importance but still useful are Appert, "De l'influence des lois françaises au Japon," 23 Journal du Droit International Privé [hereinafter J. Droit Int.] (1896) 515; Grünfeld," Lorenz von Stein und Japan," 100 Jahrbücher für Nationalökonomie und Statistik (1913) 1354; Meyer, "Der Einfluss Deutschlands auf das japanische Recht," 19 Deutsche Juristen-Zeitung (1914) 1067; Sugiyama, "L'Influence du Droit Civil Français sur le Droit Civil Japonais," 7 Revue de l'Université de Lyon (1934) 103. The Sugiyama item deals not only with the period of reception but also discusses the influence of French law down to the time of its writing.

[6] "Elements of Japanese Law," 44 T.A.S.J. (pt. 2, 1916) 1. A more schematic summation is given in Kaneko, "Les Institutions Judiciaires du Japon," 24 Revue de Droit International et de Législation Comparée [hereinafter Rev. Droit Int.] (1893) 338.

[7] "Post-war Developments in Japanese Law," [1947] Wis. L. Rev. 632.

[8] "Courts and Law in Transition," 21 Contemporary Japan, Nos. 1–3, (1952) 19; "Reform of Japan's Legal and Judicial System Under Allied Occupation," 24 Wash. L. Rev. (1949) 290.

[9] Commentaries on the Constitution of Japan (1889).

[10] Arimori, Das Staatsrecht von Japon (1892); Matsunami, The Constitution of Japan (1930); Tanaka, La Constitution de l'Empire du Japon (1899); Zamora, Derecho Constitutional Japón (1921); Boissonade, "Observations sur la Constitution du Japon," 20 Bulletin de la Société de Législation Comparée [hereinafter Bul. Soc. Leg. Comp.] (1889) 62.

[11] Among the sources are The Constitution of Japan and Criminal Law—Compiled in 1951 (Attorney-General's Office transl., 1951); The Constitution of Japan and the Court Organization Law (Supreme Court transl. 1948); Japan—Constitution 1947 (Dept. of State, Far Eastern Ser. 22, 1947).

[12] Principes de Droit Administratif du Japon (1928).

Because the law on the subject has been thoroughly changed, the work is today of historical interest only. Not nearly so comprehensive as Oda's treatise are two articles on specialized aspects of administrative law in the postwar period.[13]

An article on public law as an academic discipline may prove of interest.[14]

Civil Code. More material is available in Western languages on the Civil Code than on any other branch of Japanese law. There are many translations of the Code, but the most useful is probably the extensively annotated version prepared by De Becker.[15] At least three versions of the postwar revision have appeared.[16]

Boissonade's draft code is of historical interest only,[17] as is the comment engendered by its appearance.[18] On at least two occasions Boissonade defended his work against the critics.[19]

De Becker's commentary on the prewar Code is essential.[20] Steiner has covered the major changes made in the postwar period.[21] Hozumi[22] and Schoeder[23] have treated the Code comparatively.

With the exception of family law, studies in specialized fields of the Civil

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[13] Kakuda, "The Doctrine of Judicial Review in Japan," Osaka University L. Rev. [hereinafter Osaka U.L. Rev.] No. 2, (1953) 59; Tagami, "The Independence of Executive Power in Relation with Judicial Power," 4 The Annals of the Hitotsubashi Academy [hereinafter Annals Hitotsu] No. 1, (1953) 67.

[14] Tagami, Public Law, Japan Science Rev.—Law and Politics [hereinafter Jap. Sci. Rev.] No. 4, (1953) 33.

[15] Annotated Civil Code of Japan (Vols. 1 & 2 1909, Vols. 3 & 4 1910). Sebald's translation has annotations to 1934. The Civil Code of Japan (1934). An excellent version of Book I with extensive annotation appeared during the war. The Civil Code of Japan annotated (Nippon Gyosei Kiokai transl. 1944). Another very useful version is the tentative draft prepared by the Code Translation Committee: The Civil Code of Japan—Tentative Draft No. 1 (The Code Translation Committee transl. Vol. 1, 1936; Vol. 2, 1937; Vol. 3, 1938; Vol. 4, 1939). Other translations are, The Civil Code of Japan (Gubbins transl. 1897); Civil Code of Japan (4th ed., Loenholm transl. 1906); Japanisches Bürgerliches Gesetzbuch (Vogt transl. 1925).

[16] The Civil Code of Japan (Attorney General's Office—Liason Section transl. 1952). The same Section published earlier versions in 1951 and 1947.

[17] Projet de Code Civil pour l'Empire Du Japon (1889). Between 1882 and 1889 five volumes with commentary appeared. Projet de Code Civil pour l'Empire du Japon Accompagné d'un Commentaire par Gve. Boissonade.

[18] Lefort, La Réforme du Droit Civil au Japon, 15 Rev. Droit Int. (1883) 348; Teissier, La Réforme du Droit Civil au Japon, 8 Revue Général du Droit, de la Législation et de la Jurisprudence [hereinafter Rev. Gen.] (1884) 406.

[19] Les Anciennes Coutumes du Japon et le Nouveau Code Civil (1894); Les Nouveaux Codes Japonais (1892).

[20] Principles and Practice of the Civil Code of Japan (1921).

[21] "Post-war Changes in the Japanese Civil Code," 25 Wash. L. Rev. (1950) 286.

[22] The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence (2d ed. 1912).

[23] Notes on the Civil Code of Japan (2d ed. 1898). This is very dated and not too important.

Code are virtually nonexistent.[24] The unique nature of the family system has attracted considerable attention. Subjects such as marriage,[25] divorce,[26] adoption,[27] succession to the house,[28] the family council,[29] and paternal power[30] have all been studied. A number of more general studies have also been made.[31]

During the postwar period, the family law was more extensively revised than any other portion of the Civil Code. Steiner,[32] Wagatsuma,[33] and Izuki[33a] have given us studies relating to the changes.

A history of the academic treatment of the Civil Code is available.[34]

Civil Procedure. None of the translations of the Code of Civil Procedure are extensively annotated, nor do they contain commentary.[35] There is an out-

[24] Ishimoto, "A Study on the Liability for Torts," Osaka U.L. Rev. No. 1, (1952) 47, is perhaps the sole exception.

[25] Araki, Japanisches Eheschliessungsrecht (1893); De Becker, "Japanese Law of Marriage," 14 J. Soc'y Comp. Leg. (1914) 337; Okuma, Marriage Law in Japan, 21 T.A.S.J. (1922–23) 68; 22 *id.* (1924–25) at 3.

[26] Sakamoto, Das Ehescheidungsrecht Japans (1903) is a thorough study of the subject. De Becker, "Divorce in Japan," 15 J. Soc'y. Comp. Leg. (1915) 171 is more summary in its treatment.

[27] Tsugaru, Die Lehre von der japanischen Adoption (1903) is a very thorough study. See also Morris, "Adoption in Japan," 4 Yale L.J. (1894) 143.

[28] Ikeda, Die Hauserbfolge in Japan unter Berücksichtigung der allgemeinen japanischen Kultur und- Rechtsentwickelung (1903).

[29] De Becker, "The Japanese Family Council," 17 J. Soc'y Comp. Leg. (1917) 76.

[30] Huberich, "The Paternal Power in Japanese Law," 12 Yale L.J. (1902) 26.

[31] Hozumi's treatment is perhaps the best known. Ancestor Worship and Japanese Law (2d ed. 1912). Plage has written a detailed study. "Der Hausverband im modernen japanischen Zivilrecht," 43 Zeit. Ver. (1927–28) 13. Other material which is of some use is Eckstein, Die Entwicklung des japanischen Familienrechts (1908); Masujima, "The Japanese Civil Code Regarding the Law of the Family," 37 Am. L. Rev. (1903) 530; Miyakawa, "Japanese Laws of Domestic Relations," Annual Bulletin of the Comparative Law Bureau of the American Bar Association No. 3, (1910) 47; Smith, "The Japanese Code and the Family," 23 L.Q. Rev. (1907) 42; Taniguchi, "Über das heutige japanische 'Familien-system,'" 10 Zeitschrift für ausländisches und internationales Privatrecht 477 [hereinafter Zeit. Aus.] (1936) 477.

[32] "Revision of the Civil Code of Japan: Provisions Affecting the Family," 9 Far Eastern Quarterly (1950) 169.

[33] "Democratization of the Family Relation in Japan," 25 Wash. L. Rev. (1950) 405. This article is particularly useful because it makes an attempt to relate changes in the code to problems of social organization.

[33a] "Die Modernisierung des japanischen Familien-und Erbrechtes," 19 Zeit. Aus. (1954) 104.

[34] Ishimoto, "A Historical Review of the Japanese Science of Civil Law: Its Development and Present State," Jap. Sci. Rev. No. 4, (1953) 53.

[35] The Code of Civil Procedure of Japan (Komatsu transl. 1928) contains sparse citation. Komatsu's translation and that of De Becker, The Code of Civil Procedure (1928) were both made after the important revision of 1928 went into effect. The earlier Code of Civil Procedure was translated in 1893. A German version is also available. Japanische Civilprozessordnung und Gerichtsverfassungsgesetz (Vogt. transl. 1920).

dated work by Schultzenstein which will be useful only for the early modern law.[36] Two articles were written concerning the major revision made in 1928.[37]

The postwar Code has been translated, though it, too, lacks annotations.[38]

Nakamura has written an article which will be helpful as a guide to the historical development and the Japanese literature in the field.[39] De Becker has written on bankruptcy law.[39a]

Commercial Code. The most useful translation of the prewar Commercial Code is the excellent work of Professor Takayanagi.[40] The French version by Ripert and Komachiya is also very good.[41] A translation by Yang has treated the Commercial Code comparatively.[42] Other translations of the prewar code will probably not be too useful for they contain little by way of introduction or comment.[43] Three translations of the postwar revision are available and should be consulted because of the thorough revision of many portions of the Code.[44]

De Becker's three volume commentary is dated but still useful.[45] Rehme's commentary is even more dated than De Becker's but it, too, will still be found helpful.[46] Loenholm has given an outline of the situation as of 1895,[47] and Jenks has written a capsule summary of the main features of the Code.[48] Ishii has summarized the general orientation of commercial law study both before and after World War II.[48a]

The law of business organization has received some treatment in the liter-

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[36] "Der Entwurf einer Civilprozessordnung für Japan," 8 Zeit. Ver. 28, (1889) 3421.

[37] Kuno, "Die Novelle der japanischen Zivilprozessordnung vom 24. April 1926," 3 Zeit. Aus. (1929) 409; Yuasa, "The Revised Japanese Code of Civil Procedure," 24 Ill. L. Rev. (1930) 830.

[38] The Code of Civil Procedure (Supreme Court transl. 1950).

[39] "The Science of Civil Procedure Past and Present," Jap. Sci. Rev. No. 4, (1953) 109.

[39a] Elements of Japanese Bankruptcy and Composition Laws (1932).

[40] The Commercial Code of Japan, annotated (Takayanagi transl. Vol. 1, 1931; Vol. 2, 1932). The historical introduction and the annotations are clearly the best we possess. No study of commercial law can be undertaken without consulting this work.

[41] Code de Commerce de l'Empire du Japon (1924). This also has a very useful introduction.

[42] The Commercial Code of Japan (1911). Particular reference is made to German law.

[43] The Commercial Code of Japan (Sebald transl. 1945); The New Commercial Code of Japan (Fukuda transl. 1941); The Commercial Code of Japan (De Becker transl. 1927); The Commercial Code of Japan (ed. Loenholm, L. and Loenholm, R. transls. 1901).

[44] Code de Commerce du Japon Révisé en 1951 (Komachiya Transl. 1954); The Commercial Code of Japan (Attorney-General's Office transl. 1951); The New Commercial Code of Japan, amended in 1948 (Fukuda transl. 1948). Fukuda's translation has some explanatory notes.

[45] Commentary on the Commercial Code of Japan (3 Vols. 1913).

[46] "Das japanische Handelsrecht," 51 Zeitschrift für das Gesamte Handelsrecht (1902) 1; 52 *id.* (1902) at 444; 54 *id.* (1904) at 359.

[47] Japanese Commercial Law (1895).

[48] "The Japanese Commercial Code," 14 J. Soc'y Comp. Leg. (1932) 62.

[48a] "The Study of Commercial Law," Jap. Sci. Rev. No. 1, (1950) 53.

ature.[49] The postwar revisions have rendered most of it of little use. The most important article which has appeared since the postwar changes were made is that by Blakemore and Yazawa.[50] Special aspects of the field of business organization have been examined by Osakadani[51] and Tanaka.[52]

Aside from business organization, marine insurance[53] and mutual insurance[54] have been dealt with in Western languages.

Criminal Law. Early modern criminal law has been summarized by Longford.[55] Boissonade's draft[56] led to several articles in French journals.[57] There is a full length historical study by Otto which covers developments down to the early twentieth century.[58]

The most useful translation of the 1908 Criminal Code, the basic law in effect today, is that of Sebald.[59] Its main features have been summarized by Frölichstal.[60]

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[49] Gadsby, Commercial Registration in Japan, 28 L.Q. Rev. (1912) 305; Tanaka, "La Reforma de la Legislación sobre Sociadades Anónimas en el Japón," 27 Revista de Ciencias Económicas (1939) 936; Yang, "Legal Characteristics of Japanese Business Associations," 58 U. of Pa. L. Rev. (1909–10) 61.

[50] "Japanese Commercial Code Revisions Concerning Corporations," 2 Am. J. Comp. Law. (1953) 12.

[51] "Trust Character of Company Law (Amendment) of Japan," Osaka U.L. Rev. No. 1, (1952) 17.

[52] "The 1950 Amendment Act of the Business Corporation Law," 1 Annals Hitotsu. No. 2, 1951) 163.

[53] Kitada, Der Abandon in der Seeversicherung unter besonderer Berücksichtigung des japanischen Rechts (1908).

[54] Noz, Der Gründungsfond bei Versicherungsvereinen auf Gegenseitigkeit nach deutschem und japanischem Gesetz (1928).

[55] "A Summary of the Japanese Penal Codes," 5 T.A.S.J. (Pt. 2, 1887) 1.

[56] Projet de Code pénal pour l'empire du Japon, présenté au sénat par le Ministre de la Justice, le 8e mois de la 10e année de Meiji (Aôut, 1877), (1879); Projet révisé du Code pénal pour l'empire du Japon, accompagné d'un commentaire par Mr. Gve Boissonade (1886).

[57] Cournot, La Législation Criminelle au Japon (1886); Desjardins, "Étude sur le projet de Code pénal japonais," 18 Bul. Soc. Leg. Comp. (1887) 223; Desjardins, "Communication sur le projet de Code pénal et de Code de procédure criminelle pour l'Empire du Japon," 10 B. Soc. Leg. Comp. (1880) 234; Hamel, "La Nouvelle Législation Pénale Du Japon," 14 Rev. Droit Int. (1882) 490; Lefort, "La Réforme Du Droit Criminel au Japon," 4 Rev. Gen. (1880) p. 344.

[58] Geschichte des japanischen Strafrechts (1913).

[59] The Criminal Code of Japan (1936). Other translations are, Japanische Strafgesetze (Kusano, et al. transl. 1927); The Criminal Code of Japan (De Becker transl. 1918); Das neue japanische Strafgesetzbuch (Loenholm transl. 1907). Drafts which precede the 1908 Code have also been translated. Second Revised Draft of Proposed Criminal Code (De Becker transl. 1903); Vorentwurf zu einem Strafgesetzbuch für das Kaiserliche Japanische Reich (Okada transl. 1899).

[60] "Strafgesetz für das Kaiserliche Japanische Reich vom 23 April 1907," 29 Archiv für Kriminalantropologie und Kriminalistik (1908) 325.

Because of the important changes made in the postwar period, the new translations must be consulted.[61] Myers has given us a very good article outlining the principal changes which were incorporated in it.[62]

The only special topic in criminal law which has been covered is that of patricide which has been dealt with by Uematsu.[63]

Dando has written a short piece on criminal law as an academic discipline.[64]

The Code of Criminal Procedure. De Becker's translation of the prewar Code of Criminal Procedure is standard.[65] Boissonade's draft of a code and his commentaries thereon were published.[66] Something of the history of criminal procedure can be found in an article by Gadsby.[67]

The Code of Criminal Procedure was one of the codes which underwent the most extensive revision in the postwar period. Appleton has covered the major changes in great detail.[68] Several translations of the revised Code have appeared.[69]

Specialized studies are very few. Meyers has contributed a comment on the Inquest of Prosecution, a variant on the Grand Jury.[70] Tanaka has dealt with some questions of evidence under the new Code.[71]

Private International Law. In Japan conflict of laws has been the subject of some legislative regulation, and the provisions pertaining thereto are usually

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[61] The Criminal Code of Japan (Blakemore transl. 1950); The Penal Code of Japan (Supreme Court transl. 1950).

[62] "Revisions of the Criminal Code of Japan During the Occupation," 25 Wash. L. Rev. (1950) 104.

[63] "Parricides in Japan," 2 Annals Hitotsu. (1951) 205.

[64] "Criminal Law," Jap. Sci. Rev. No. 4, (1953) 27.

[65] Japanese Code of Criminal Procedure (1918). There is a French translation dating from the nineteenth century. Code de Procédure Pénale du Japon (1892).

[66] Projet de code de procédure criminelle pour l'Empire du Japon présenté au sénat par le Ministre de la Justice le 9e mois de la 12e année de Meiji (Septembre 1879) (1879); Projet de code de procédure criminelle pour l'empire du Japon accompagné d'un commentaire par M. Gve. Boissonade (1882). See also Larnaude, "Les Codes Français au Japon," 13 Review Critique de Législation et de Jurisprudence (1884) 93. This deals with Book II of the draft Civil Code as well as with criminal procedure.

[67] "Some Notes on the History of the Japanese Code of Criminal Procedure," 30 L.Q. Rev. (1914) 448.

[68] "Reforms in Japanese Criminal Procedure Under Allied Occupation," 24 Wash. L. Rev. (1949) 401.

[69] The Code of Criminal Procedure and the Rules (Supreme Court transl. 1950); The Code of Criminal Procedure (Attorney-General's Office transl. 1950). A commercial edition of a 1948 edition prepared in the Attorney-General's Office (The Code of Criminal Procedure (Attorney-General's Office transl. 1948), The Code of Criminal Procedure (1949), is also to be had.

[70] "The Japanese Inquest of Prosecution," 64 Harv. L. Rev. (1950) 279.

[71] "Law of Criminal Evidence in Japan," 2 Annals Hitotsu No. 1, (1952) 193. There is also an outdated article on the problem of trial in the absence of the defendant, Torii, Das Contumacialverfahren im japanischen Strafprocess (1891).

found appended to translations of the Civil Code.[72] They are also available in other sources.[73]

The most thorough survey of the subject has been made by Huch[73a] while other general studies are by Baty[74] and Yamada.[75] A very thorough study of execution of foreign judgments was written shortly before the war and can still be consulted to advantage.[76] The will as a conflicts problem has also been reported on.[77]

Conclusions. From this survey, it is apparent that the major stimulus to writing in Western languages on Japanese law has been the appearance of codes and their not infrequent revisions. As a consequence, we possess adequate translations and commentaries on the major codes. What is sadly lacking is material which goes beyond code exposition. It is to be hoped that our Japanese colleagues, on whom almost complete reliance must be placed for work in Japanese law, will provide us with more information than they have in the past on law as an operative social institution. Needless to say, such work is eagerly awaited.

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[72] Law Concerning the Application of Law in General, in Civil Code of Japan, App. p. 1 (Vol. 2, De Becker transl. 1909).

[73] Niemeyer, "Das internationale Privatrecht im japanischen Civilgesetzbuch," 11 Zeit. Int. (1902) 197.

[73a] Japanisches Internationales und Interlokales Privatrecht (1941).

[74] "The Private International Law of Japan," 2 Monumenta Nipponica (1939) 386.

[75] "Le droit international privé au Japon," 28 J. Droit Int. (1901) 632; "Droit international privé du Japon," 6 Répertoire de droit international (1930) 533.

[76] Narahashi, Exécution des Jugements Étrangers au Japon (1937).

[77] Kubo, "The Will in Private International Law of Japan," 3 Annals Hitotsu No. 1 (1952) 129.

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Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE
American Foreign Law Association

Ablett's Estate, In re, 206 Misc. 157, 132 N.Y.S. 2d 488 (Surr. Ct. Oneida County, July 2, 1954): remainder given to the London Hospital of Whitechapel, London, England; delivery to governing body of hospital which had been nationalized after testatrix's death; qualification of Board of Governors under British National Health Service Act of 1946.

Aetna Life Insurance Co. v. Du Roure, 123 F. Supp. 736 (S.D. N.Y. June 16, 1954): delay in payments of proceeds of annuity policies issued to Raymond Patenotre, a citizen of France, since deceased.

Akata v. Brownell, 125 F. Supp. 6 (D. Hawaii, Nov. 3, 1954): repatriation, after internment in U.S.A., of Japanese national resident of Honolulu; residence in Japan after cessation of hostilities not residence in enemy territory within the meaning of sec. 2, Trading with the Enemy Act; maintenance of Koseki Tohon (family register) in Japan.

Algazy v. Algazy, 135 N.Y.S. 2d 123 (Sup. Ct. Nov. 4, 1954): no effect of Roumanian and French court decrees on validity of previous Nevada divorce; separation action of resident of Paris, France against husband in New York.

American Ins. Co. v. Lester, 214 F. 2d 578 (4th Cir. July 23, 1954): misrepresentation regarding policies for coal mines issued by English insurance company under laws of England.

Anderson, Clayton & Co., Inc. v. United States, 122 F. Supp. 835 (Ct. Cl. July 13, 1954): destruction of ship's cargo before Japanese landing in Cebu, Philippines, or taking by native population in April 1942; lack of authority of American army officials for such appropriation.

April Productions, Inc. v. G. Schirmer, Inc., 284 App. Div. 639, 1037 (1st Dept. June 8, 1954): 1917 agreement for English adaptation of German musical play ("Maytime"); payment of royalties after its termination by 1942 court decision until copyright's expiration in 1945.

Augello v. Dulles, 122 F. Supp. 329 (E.D. N.Y. July 14, 1954): offer in 1943 to the U. S. occupying forces in Italy not sufficient to overcome expatriation by prior service in Italian Army and oath of allegiance to King of Italy.

Barandiaran, Petition for Naturalization of Gregorio, 123 F. Supp. 827 (S.D. N.Y. Sept. 13, 1954): permission to Spanish seaman in U. S. armed forces to cross into Mexican territory; return to Texan post no illegal entry to preclude naturalization.

Barnes v. United States, 215 F. 2d 91 (9th Cir. Aug. 13, 1954): illegal transportation of Mexicans over international boundary at place other than legal place of entry.

Becker v. Atlantic Refining Company, D. Maryland, No. 6046, Oct. 26, 1954: residence within Austria from 1922 to 1948; conclusiveness of finding by Alien Property Custodian of enemy character of former owner of vested real property; effect of private sale.

Bennett v. Irving Trust Company, 132 N.Y.L.J. Sept. 28, 1954, 1 col. 1: title to drafts of Banque Melli in Iran; computation of interest in action in aid of attachment.

Bingham and Company v. Bie, 133 N.Y.S. 2d 453 (Sup. Ct. May 28, 1954): assignment of claims against Schering, a German corporation whose assets were vested by Alien Property Custodian.

Blair Holdings Corp. v. Rubinstein, 122 F. Supp. 602 (S.D.N.Y. June 24, 1954): absence of positive averment of Portuguese citizenship of defendant who alleges status of stateless person,

renders complaint jurisdictionally defective (alienage jurisdiction of federal court); no proof of Panamanian corporation's doing business in New York.

Brillis v. Brillis, 132 N.Y.L.J., Nov. 15, 1954, 13 col. 8: annulment of marriage arranged to facilitate re-entry into U.S. of resident and citizen of Greece as non-quota immigrant.

Caltex (Philippines), Inc. v. United States, 122 F. Supp. 830 (Ct. Cl. July 13, 1954): just compensation for petroleum products seized by U. S. army commander on Dec. 8, 1941, immediately following Japanese attack on Philippines.

Carius v. New York Life Insurance Company, 124 F. Supp. 388 (S.D. Ill. Oct. 6, 1954): death during Korean hostilities resulted "from war or any act incident thereto" within the meaning of provision of insurance policy for exclusion of double indemnity.

Collazo v. Collazo, 132 N.Y.L.J. Nov. 23, 1954, 7 col. 8: no collateral attack on divorce decree obtained in Puerto Rico.

Compania de Astral, S.A. v. Boston Metals Co., 107 A. 2d 357 (App. Maryland July 27, 1954): conditions imposed by Maritime Administration on transfer of vessel to Panamanian flag; consent of Panamanian corporation to such approval.

Couto v. Shaughnessy, 123 F. Supp. 926 (S.D.N.Y. Sept. 3, 1954): deportability of Portuguese seaman who had entered on temporary permit and overstayed leave.

Criado y Gomez, Estate of Pedro F., 132 N.Y.L.J. Nov. 1, 1954, 8 col. 5 (Surr. Ct.): will in Spanish language of resident of New York who died in 1878, disposing also of property in Cuba.

Cuba Railroad Company v. United States of America, 124 F. Supp. 182 (S.D.N.Y. July 14, 1954): computation of annual amount paid by Cuban railroad company on settlement of claim for tax deficiency.

Cunningham v. Commissioner of Internal Revenue, 22 T.C. No. 110 (Tax Court July 15, 1954): activities in Japan alleged constituting carrying on of a trade or business not evidenced.

Daniel Lumber Company v. Empresea Hondurenas, S.A., 215 F. 2d 465 (5th Cir. Sept. 3, 1954): validity, under Honduran law, of contract of Honduran corporation with partnership for timber cutting on corporation's Honduran properties; proof of Honduran statutory law by experts; trial court not precluded from own examination of foreign law.

David-Zieseniss v. Zieseniss, 132 N.Y. L.J., Oct. 6, 1954, 6 col. 8: alimony awarded by French court; blood grouping test to be taken in France. Cp. notes in 28 N.Y.U.L.Q. 1478 (1954); 68 Harv. L. Rev. 543 (1955).

De Bitche, Estate of Henri B., 132 N.Y. L.J. Oct. 22, 1954, 9 col. 4 (Surr. Ct.): instructions of Belgian citizen residing in Switzerland to New York bank as assignment of assets to his wife.

Del Drago v. Commissioner of Internal Revenue, 214 F. 2d 478 (2d Cir. July 19, 1954): inclusion of income from British securities held by bank in London in taxpayer's name; "our law of trusts comes from and is the English law" (p. 480).

Drew v. Hobby, 123 F. Supp. 245 (S.D. N.Y. July 19, 1954): recognition in New York of Mexican divorce when neither spouse was domiciled in Mexico but husband appeared and also wife through authorized counsel.

Durum, A. G. v. Herlitz, 132 N.Y.L.J. Sept. 20, 1954, 7 col. 6: payments to Tata, a company in India, under joint venture.

Ehrlich v. German Savings Bank & Clearing Ass'n, resp., Rheinische Girozentrale Und Provinzial Bank, def., 135 N.Y.S. 2d 636, (App. Div. 2d Dept. Nov. 1, 1954): action against German bond-debtor corporation and defendant German guarantor; service on Corporation Trust Company as process agent vacated since its authority was limited to actions by indenture trustees only.

El Chico, Inc. v. El Chico Cafe, 214 F. 2d 721 (5th Cir. July 30, 1954): no injunction for operator of Spanish type restaurant against use of trade name "El Chico" in connection with Mexican type canned food made in Texas.

Elet v. Winter, 132 N.Y.L.J. Oct. 25, 1954, 7 col. 8: custody of child in mother, pursuant to Mexican divorce decree; visitation rights of father.

England v. England, 205 Misc. 645, 129 N.Y.S. 2d 167 (Dom. Rel. Ct. City N.Y. March 26, 1954): validity of marriage in N. Y. of alien with transient visa; liability of support.

Felton v. Goldberg, 132 N.Y.L.J. Sept. 23, 1954, 6 col. 8: no enjoinment of prosecution of lawsuit instituted in London, England upon past due loan; usury under English law.

Fink v. Bradford, 132 N.Y.L.J. Nov. 10, 1954, 7 col. 3 (App. Div. 1st Dept.): judicial notice of foreign (Italian) law discretionary with court.

Florance v. Donovan, 307 N.Y. 705 (N.Y. July 14, 1954): conviction in 1946 of crime of robbery by court-martial outside of United States (Japan).

Ford Motor Company v. Jarka Corporation, 134 N.Y.S. 2d 52 (Mun. Ct. N. Y. April 16, 1954): bill of lading with Empresa Naviera de Cuba, S.A. for transportation of parts for Ford trucks to Havana, Cuba.

Framen Steel Supply Co. v. Irving Trust Co., 132 N.Y.L.J. Oct. 21, 1954, 7 col. 8: sale of shipment of steel from Belgium.

Frazier v. Foreign Bondholders Protective Council, 133 N.Y.S. 2d 606 (Sup. Ct. June 21, 1954): former Peruvian bondholders' action for alleged inducement by foreign government to break contract on 1947 offer on Peruvian bonds; "scrutiny the exercise of its sovereignty by Peru . . . not properly within the jurisdiction of our courts" (p. 611).

Frelingstad v. Frelingstad, 134 N.Y.S. 2d 63 (Dom. Rel. Ct. Sept. 16, 1954): no recognition of Mexican divorce.

Gaspar v. State of Montana, 275 P. 2d 656 (Montana Oct. 21, 1954): reciprocity, as of Aug. 13, 1940 (testator's death), of rights of Americans to inherit property in Rumania; application of Hungarian laws of inheritance in County of Arad, Rumania; restrictions upon movement of money, under 1951 amendment of Rev. Code of Montana sec. 91–250.

Goodstein v. Goodstein, 134 N.Y.S. 2d 385 (Sup. Ct. July 5, 1951): no injunctive relief against obtaining Mexican divorce decree which would not have to be recognized.

Government of Guam v. Kaaneche, 124 F. Supp. 15 (D. Guam, Oct. 1, 1954): embezzlement by withholding taxes in Guam; sec. 506 Penal Code of Guam not being incorporated into Revenue Code of United States.

Gros, Ex parte, 123 F. Supp. 718 (N.D. Cal. June 16, 1954): expatriation by voluntary acts during long residence in Germany.

Hale v. Bukenberger, Probate Ct. Franklin County, Ohio, No. 121, 551 (Sept. 3, 1954): authority of aliens (German nationals) to inherit property under laws of Ohio, sec. 2105–16 of Revised Code of Ohio.

Hamburger, Estate of Leentje, 132 N.Y. L.J. Oct. 21, 1954, 8 col. 1 (Surr. Ct.): distribution in accordance with Dutch law.

Hamer v. Commissioner of Internal Revenue, 22 T.C. No. 45 (Tax Ct. May 17, 1954): bona fide residence in China at employment with United Nations agencies.

Harrison v. Harrison, 214 F. 2d 571 (4th Cir. July 19, 1954): no extraterritorial validity of Mexican divorce decree because of lack of bona-fide domicile in Mexico.

Willard Helburn, Inc. v. Commissioner of Internal Revenue, 214 F. 2d 815 (1st Cir. July 22, 1954): Massachusetts corporation's borrowing pounds sterling in England for purchase of lambskins in New Zealand; effect of 1949 devaluation of English currency at date of repayment; dollar difference ("windfall") as taxable income.

Higa v. Transocean Airlines, 124 F. Supp. 13 (D. Hawaii, Oct. 1, 1954): no common law recognition of civil action for plane crash east of Wake Island; no jurisdiction under Death on the High Seas Act, 46 U.S.C.A. sec. 761, but only in admiralty.

Hillers, Matter of, 132 N.Y.L.J. Oct. 18, 1954, 12 col. 1: no jurisdiction for cus-

tody of non-resident child (living with mother in Germany).

Intercontinental Trading Co., Inc. v. Sterns, Inc., 132 N.Y.L.J. Oct. 6, 1954, 7 col. 5: recovery of advance payments for oil to be delivered in 1941 to China; effect of freezing of funds.

Kurt M. Jackmann Co., Inc. v. Schiff, Terhune & Co., Inc., 132 N.Y.L.J. Nov. 3, 1954, 8 col. 8: extension in 1949 of policy for shipments made in the name of the Republic of Poland.

Kalv v. United States, 124 F. Supp. 654 (Ct. Cl. May 4, 1954): overseas differential payment for engineer in Department of Army during service in Japan under Supreme Command Allied Powers not allowed for period during which he was not abroad.

Karadzas, Petition of, 124 F. Supp. 25 (S.D.N.Y. Sept. 23, 1954): substitution of alien's continuous residence by service on vessel with U. S. home port.

Keefe v. Dulles, 23 U. S. Law Week 2125 (D. Col. Cir. Sept. 16, 1954): alleged violation of American soldier's constitutional rights in a French criminal trial; no legal duty of U. S. Secretary of State to obtain soldier's release through diplomatic channels, under Status of Armed Forces Treaty, 99 Cong. Rec. 8724 (1953).

Klein, Matter of Henry R., dec'd, 132 N.Y.L.J. Nov. 18, 1954, 11 col. 1: proof that under law of Province of Quebec, Canada, instrument on file in public office cannot be removed.

Kopsinis v. Kopsinis, 132 N.Y.L.J. Nov. 4, 1954, 11 col. 6: no annulment of Greek marriage with member of Greek army for alleged misrepresentation as to future employment in U. S.

Koster v. Banco Minero de Bolivia, 307 N.Y. 831, 122 N.E. 2d 325 (N.Y. Oct. 7, 1954): order denying sovereign immunity to bank as agency of the Republic of Bolivia, does not finally determine action or special proceeding within the meaning of the Constitution; motion for leave to appeal since dismissed.

Lambros Seaplane Base, Inc. v. The Batory, 215 F. 2d 228 (2d Cir. Aug. 17, 1954): seaplane in custody of British Receiver of Wrecks at ship's first port of call in England; salvage claims under art. 26 Pan American Convention on Commercial Aviation, 47 Stat. 1907 (1931). See note, 52 Mich. L. Rev. 1229 (1954), 125 F. Supp. 23 (S.D.N.Y. Oct. 21, 1954).

Laszczuk v. Opechi, 133 N.Y.S. 2d 279 (Sup. Ct. Herkimer County, N.Y. April 2, 1954): dispute on Ukrainian congregation's affiliation with certain uniate of Catholic church in Rome or with church which recognized as its Ecclesiastical Head the Patriarch of Constantinople.

La Territorial de Seguros, S. P. v. Shepard Steamship Company, 124 F. Supp. 287 (E.D.N.Y. April 19, 1954): damage of only part of shipper's goods by fire on vessel on voyage to Buenos Aires, Argentina.

Lauraitis, Matter of Frank, dec'd, 134 N.Y.S. 2d 907 (Surr. Ct. N.Y. Co. Sept. 15, 1954): deposit of shares of distributees in Lithuania with City Treasurer; compensation for services rendered by Lithuanian Consul General.

Leefers, Estate of Richard, deceased, 127 A.C.A. 673, 274 P. 2d 239 (Cal. App. Sept. 27, 1954): no reciprocal rights of taking personal property for American citizens in Germany as of Jan. 15, 1944, date of decedent's death.

Lee Wing Hong v. Dulles, 214 F. 2d 753 (7th Cir. July 30, 1954): no divestment of American nationality of person born in China because of failure to enter U. S. before sixteenth birthday, due to passport refusal.

Lehmann v. Acheson, 214 F. 2d 403 (3rd Cir. June 18, 1954): no expatriation of native born citizen of U.S. by reason of conscription into Swiss army and taking oath of allegiance to Switzerland.

Lew v. Lew, 132 N.Y.L.J. Sept. 15, 1954, 8 col. 8: divorce in Soviet Russia; termination agreement of parties not considered invalid or illegal; inquest to be formally taken before court.

Lim Fong v. Brownell, 215 F. 2d 683 (D.

Col. Cir. July 22, 1954): preliminary injunctive relief against deportation of Chinese aliens to Continental China.

Lipton v. Lockheed Aircraft Corp., 307 N.Y. 775, 121 N.E. 2d 615 (N.Y. July 14, 1954): damages for death in airplane crash in Egypt; statute of limitations in sec. 130, N.Y. Decedent Estate Law, not applicable to causes of action under Egyptian law.

Longo v. Longo, 133 N.Y.S. 2d 269 (Sup. Ct. May 17, 1954): separation judgment following Mexican divorce conclusive as to invalidity of Mexican decree.

Luisoni v. Barth, 132 N.Y.L.J., Nov. 22, 1954, 7 col. 3: termination of employment of Swiss consular service; applicable Swiss statutory law.

Lurcy, Estate of Georges, 132 N.Y.L.J. Oct. 25, 1954, 9 col. 1 (Surr. Ct.): determination of "French property" under will of New York resident; further holographic will unwitnessed in New York not to be recognized in France.

Magner v. Hobby, 215 F. 2d 190 (2d Cir. July 13, 1954): collusive mail order divorce granted by Mexican court a nullity under New York law which precludes recovery of social security benefits by other woman (as widow) who had married divorced in Connecticut after Mexican divorce.

Marks v. Kolko, 132 N.Y.L.J. Nov. 15, 1954, 8 col. 4: sales order initiated in Israel; Israeli principal of New York agent.

Marsico v. Tramutolo, 132 N.Y.L.J. Sept. 24, 1954, 11 col. 7: principal in Italy; non-joinder of allegedly indispensable parties.

Master, Matter of Aaron, 132 N.Y.L.J. Oct. 26, 1954, 11 col. 3 (Surr. Ct.): legacy to sister in Soviet Russia to be deposited with City Treasurer to await proof that she is alive or died without issue.

Matausch v. Moacanin, 132 N.Y.L.J. Nov. 18, 1954, 8 col. 1: bill of particulars as to Swiss and Yugoslav statutory law.

McCloskey v. Reconstruction Finance Corp., 132 N.Y.L.J. Sept. 14, 1954, 8 col. 1: no stay of action because of claim of sovereign immunity of Republic of Bolivia in (then) pending case of Koster v. Banco Minero de Bolivia, 307 N.Y. 831.

Miltwoch, Estate of Kathe, 132 N.Y.L.J., Nov. 16, 1954, 7 col. 8: distribution in accordance with the law of the Netherlands.

Murarka v. Bachrack Bros., Inc., 215 F. 2d 547 (2d Cir. Aug. 3, 1954): de facto recognition of Interim Government of India; judicial notice of independence movement 1946–1949; Indian Independence Act (10&11 Geo. VI c. 30); certificate of Indian Vice-Consul at New York, the issuance of which was authorized by the Ministry of External Affairs of India (which in turn acted upon certificate of District Magistrate at New Delhi), as competent evidence of Indian citizenship; presumption of regularity of procedures of foreign governments and agencies.

Newton v. Pedrick, 132 N.Y.L.J. Oct. 22, 1954, 1 col. 1 (U.S. Ct. App. 2d Cir. April 28, 1954): taxability of periodic payments received by wife, divorced in France in 1924; French decree awarding sole custody of children to wife.

Niewinski, Estate of Aleksander, 132 N.Y.L.J. Nov. 9, 1954, 9 col. 8: shares of Polish residents to be paid into court pursuant to sec. 269, Surrogate's Court Act.

Pavlick v. Meriden Trust & Safe Deposit Co., 107 A. 2d 262 (Conn. July 27, 1954): non-resident (Czechoslovakian) aliens cannot take title to realty devised to them and located within Connecticut; devise void ab initio.

Wm. Penn Fire Ins. Co. v. Compania De Seguros A Mundial, 132 N.Y.L.J., Oct. 21, 1954, 6 col. 7: contract between Pennsylvania company and Portuguese corporation providing for arbitration in New York governed by laws of Portugal where offer was accepted (lex loci contractus); invalidity of contract under Pennsylvania law immaterial; judicial notice of foreign law under Sec. 344-a N.Y. Civil Practice Act.

Pennsylvania R. R. Co. v. United States, 124 F. Supp. 52 (D. New Jersey, July 29, 1954): explosion in South Amboy, N.J. of mines bought by Government of Pakistan from Ohioan manufacturing company in 1950; liability of U.S. Coast Guard under so-called Explosives Act, 46 U.S.C.A. § 170.

People v. Hart, 133 N.Y.S. 2d 98 (Wayne County, N.Y. June 10, 1954): no jurisdiction for reckless navigation of vessel in Lake Ontario as not "within the state", sec. 2 (4) of N.Y. Navigation Law.

Pierce v. Commissioner of Internal Revenue, 22 T.C. No. 62 (U.S. Tax Ct. June 8, 1954): bona fide residence in Iceland through employment as accountant at international airport in Keflavik, Iceland.

Poutos v. Mene Grande Oil Co., 123 F. Supp. 577 (S.D.N.Y. April 22, 1954): recovery by Greek seaman presently residing in Greece, for discharge from service on corporation's ships flying flag of Venezuela, to be governed by Venezuelan law, all records being in Venezuela; dismissal on ground of forum non conveniens.

President of United States ex rel. Feretic v. Shaughnessy, 122 F. Supp. 739 (S.D. N.Y. July 14, 1954): Jugoslavian admitted as crew member in 1944 denied in 1949 status of displaced person; stay of deportation because of physical persecution on return to Jugoslavia denied; reliance on Refugee Act of 1953, 50 U.S.C.A. App. § 1971 d, to be reconsidered.

Puzyk, Matter of Stephen, 132 N.Y.L.J. Nov. 12, 1954, 11 col. 1: deposit of shares of distributees residing in Poland with City Treasurer.

Reconstruction Finance Corp. v. Commercial Union of America Corp., 123 F. Supp. 748 (S.D.N.Y. April 16, 1954): liability of buyer for increased price of Mexican chickpeas to be exported to Spain; obligation of Foreign Economic Administration to grant appropriate export licenses.

Rederiaktierbolaget v. Compania de Navegacion "Anne" S.A., 124 F. Supp. 118 (S.D.N.Y. Sept. 16, 1954): proceeding upon libel in Canal Zone does not bar similar action in New York.

Rennert, Estate of Adolf, 132 N.Y.L.J. Nov. 10, 1954, 8 col. 8: distribution in accordance with law of Poland.

River Plate and Brazil Conferences v. Pressed Steel Car Company, 124 F. Supp. 88 (S.D.N.Y. Sept. 17, 1954): no breach of conference agreement of association of common carriers by water, not providing for exclusive patronage, by shipment from Savannah, Georgia to Santos, Brazil, through carrier not a member of conference.

Robbins, Matter of Clarence A., dec'd, 132 N.Y.L.J. Nov. 17, 1954, 12 col. 4 (Surr. Ct.): compensation for legal services rendered on behalf of ancillary guardian and to ward in France where testator resided, executed his will and died in 1949.

Rosenbaum v. Rosenbaum, 132 N.Y.L.J. Nov. 26, 1954, 7 col. 3: no temporary injunction restraining husband from proceeding in divorce action in Juarez, Mexico since judgment of Mexican court without jurisdiction would be a nullity.

Rumohr, In re von R.'s Will, 284 App. Div. 773, 135 N.Y.S. 2d 177 (4th Dept. Nov. 17, 1954): disposal in 1937 by resident of Germany of her "United States estate"; interest of German nationals as beneficiaries of American trust.

Sanuiti, Petition of, 124 F. Supp. 69 (N.D.N.Y. April 15, 1954): claim to wages deposited in New York for Yugoslav seaman who deserted from a ship at Split, Yugoslavia.

Saydah v. Atlantic Mutual Ins., 132 N.Y.L.J. Dec. 24, 1954, 3 col. 6: loss of embroideries shipped from Shanghai, China to the Philippines in Nov. 1941; no constructive loss under war clause of insurance policy when loss occurred after expiration of 15-day period from vessels' arrival in Manila.

Schens, Matter of Andrew, deceased, 132 N.Y.L.J. Nov. 15, 1954, 12 col. 7: trust account for decedent's daughter residing in Latvia.

Serralles v. Viaden, 132 N.Y.L.J. Nov. 19, 1954, 8 col. 1: paternity action against citizen of Puerto Rico filed by child in Supreme Court of Puerto Rico; effect on father's action for declaratory judgment on non-parentage instituted in New York; evaluation of Puerto Rican laws best by trial court.

Smith v. Smith, 132 N.Y.L.J. Dec. 23, 1954, 4 col. 5: non-recognition of Mexican divorce decree.

Sorenson, Estate of S.P.A., Cal. App. 2d Dist. Div. 1, Civ. No. 20252, Nov. 29, 1954: impossibility of German beneficiaries of American estate to "appear and demand" within five years under sec. 1026 Cal. Probate Code.

Superior Insurance Company v. Restituto, 124 F. Supp. 392 (S.D. Cal. Oct. 5, 1954): cancellation of bodily injury policy issued by Canadian company.

Syquia v. United States, 124 F. Supp. 638 (Ct. Cl. Oct. 5, 1954): provision in lease for "duration of war" does not extend beyond time of formal surrender of Japan on Sept. 2, 1945.

Teneria "El Popo" S.D.R.L. v. Home Insurance Company, 132 N.Y.L.J. Dec. 17, 1954, 6 col. 6: damages arising out of shipment of bales of goatskins from Brazil to Mexico.

Torres v. Steamship Rosario, 125 F. Supp. 496 (S.D.N.Y. Oct. 18, 1954): transfer to court in Puerto Rico of action of resident thereof to recover for personal injuries which occurred in Puerto Rico.

Trois v. Trois, 135 N.Y.S. 2d 516 (Sup. Ct. Sept. 20, 1954): no injunction, for lack of jurisdiction, to restrain husband in California from proceeding with Mexican divorce action.

Uebersee Finanz Korporation, A.G., Liestal, Switzerland v. Brownell, D. Col., Civil No. 26453, Dec. 20, 1954: division of stock interests in Swiss corporation; application of Swiss law; control of Swiss corporation through German gift agreement, as interpreted by German law.

United States ex rel. Lee Kum Hoy v. Shaughnessy, 123 F. Supp. 674 (S.D. N.Y. Aug. 31, 1954): applicaiton of blood test as condition to admission as child of American citizen, only to persons of Chinese descent constitutes denial of due process.

United States v. Niarchos, 125 F. Supp. 214 (D. Col. Sept. 9, 1954): alien stockholders' interests in American corporations, in violation of Merchant Ship Sales Act of 1946, as amended, distinct from corporation's property interest.

United States v. Onassis, 125 F. Supp. 190 (D. Col. Sept. 9, 1954): misrepresentation as to citizenship status of alien stockholders in American and Panamanian shipping companies.

Valley Steel Products Co. v. Associated Metals and Minerals Corp., 132 N.Y.L.J. Dec. 22, 1954, 4 col. 6: finality of certificate of international inspection service for shipment of merchandise from Europe to Texas.

Villarta v. United States, 125 F. Supp. 253 (Ct. Cl. Nov. 1, 1954): effect of statute of limitations on overseas allowances for employment in Manila, Philippine Islands, Regional Office of the Veterans' Administration.

Virgin Islands Bar Association v. Dench, 124 F. Supp. 257 (D. Virgin Islands, Nov. 18, 1954): violation of terms of admission of attorney to practice in the Virgin Islands (to give up practice of law in New York); appeal dismissed, 215 F. 2d 810 (3rd Cir. Sept. 8, 1954), as order was not final disposition of controversy.

John Walker & Sons, Ltd. v. Tampa Cigar Company, Inc., 124 F. Supp. (S.D. Florida Sept. 2, 1954): British whisky corporation's claim to exclusive use of trade name Johnnie Walker picture and trademarks registered in U. S. continuously since 1908.

Wielgosh, Matter of George, dec'd, 132 N.Y.L.J. Nov. 18, 1954, 11 col. 1 (Surr. Ct.): shares of distributees residents of Poland to be deposited with Treasurer of City of New York, pursuant to sec. 269 Surrogate's Court Act.

Book Reviews

NIEDERER, W. *Einführung in die allgemeinen Lehren des internationalen Privatrechts*. Zürich: Polygraphischer Verlag, A. G. Pp. 405.

A few years ago Swiss jurisprudence made a most valuable contribution with the work of A. F. Schnitzer, *Handbuch des Internationalen Privatrechts*, and now follows the book of Niederer. Whereas Schnitzer's work contains a masterful and most complete presentation of the complex problems of Swiss conflict of laws, the book of Niederer presents an epitome of general rules of conflict of laws. The book is distinguished by an excellent clarity of thought and diction and represents a very fine contribution to constructive thinking on the subject. It starts with an historic introduction and gives as an annex a bibliography well arranged according to countries and subject matter, thus unburdening the footnotes under the text in a desirable way. The essential part of the work is embodied in the section on the theoretical foundations of the rules of conflict of laws.

I have often in discussions with European lawyers encountered the idea that we here live under the shadow of Beale, and that the Restatement grown under Beale's auspices is a kind of mirror of present practice. Niederer knows better (pp. 95, 201), being aware that we are happily outgrowing Beale and that the Restatement has ceased to represent the present law on many important problems. Wherever I took otherwise the opportunity to investigate Niederer's statements, I could only feel admiration for the thoroughness and security with which he handles the subject.

Reservations appear when going into the second part of the book which has the heading "The General Theoretical Specific Problems," and these reservations come to a climax with the chapter on renvoi, Paragraph 41 bearing the headline "The Right Solution of the Renvoi Problem" (*Die richtige Lösung des Renvoi-Problems*). We know when approaching renvoi that we are skating on thin ice, that no harmony prevails between the laws of the various countries, let alone uniformity; even within the frontiers of the United States, we have not arrived at a satisfactory harmony of decisions. With this situation in mind, it appears somewhat premature for anybody to speak about a "right" solution of the renvoi problem. The purely deductive method which serves the author so well in the general part of his book, does not lend itself exactly to the treatment of special problems. It would, in my opinion, in no way detract from the value of the book, to the contrary, it would enhance its usefulness if the author, in this special part, would modify his method by extensively interweaving into the text the pertinent decisions—as Martin Wolff does in his *Private International Law*.

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BLOM-COOPER, L. J. *Bankruptcy in Private International Law*. London: The Eastern Press, Ltd., 1954. Pp. 159.

SAFA, P. *La Faillite en Droit International Privé. Analyse des jurisprudences libanaise, syrienne et égyptienne à la lumière du droit comparé*. 2nd ed. Beirut: Imprimerie Angelil, 1954. Pp. vii, 356.

Works on conflict of laws in bankruptcy are rare, and good ones even rarer. Both books under review belong to the latter class.

Dr. Blom-Cooper's essay is a doctoral thesis with which the author, an Englishman, LL.B., London, and a member of Middle Temple, obtained from the University of Amsterdam the degree of *doctor in de rechtsgeleerdheid*. It contains a full discussion of the English conflicts rules on bankruptcy and, in addition, states the conflicts law of the Netherlands, of this country, of Belgium, and of France. It is thus of sufficient general interest to be noted here. In particular, the presentation of the Dutch law in the English language is most welcome, as it is little known outside the Netherlands. Parts of the thesis, including the comparative law part, now appear in the International and Comparative Law Quarterly and may be conveniently consulted there.

On the English law, the author has endeavored, with a wide amount of success in our judgment, to analyze critically what are considered to be the English conflicts rules. The first, we believe, to undertake it, he has discussed together what, we think, belongs together, but traditionally is discussed separately: insolvent estate problems respecting living as well as deceased persons. He has also considered the arrangement (composition) problems as bankruptcy problems and not as questions of mere "discharge from obligations," as is still the habit in England and, to some extent, also in the United States. This treatment has added further avenues of thinking which should prove helpful in the discussion of the law as it is and should be. The treatment could also be applied to the matter of insolvent corporations with which the thesis does not deal.

One may perhaps regret that the author has not gone farther in his critical analysis of the statutory rules in England on bankruptcy jurisdiction which, by an involved system, limit the jurisdiction of the courts and do not enable them always to assume jurisdiction when the debtor has assets in England. The consequences of this limitation do not seem to have been exclusively happy ones. The limitation has led to much litigation, and the practical advantage of maintaining the limitation would seem to require justification. The results of *Gailbraith* v. *Grimshaw* [1910] 1 K. B. 339 (C.A.), regretted by the author, where an attaching creditor was able to keep a preference void both under English bankruptcy law and the law of the foreign country in which the bankruptcy was declared, would have been avoided under a system where presence of assets is sufficient to assume bankruptcy jurisdiction. But these are questions on which opinions may differ and which need not be exhaustively covered in a thesis. It is hoped that, after this successful first step, the author will

keep interest in the subject and produce a comparative text covering the entire field of insolvent estates in private international law.

Dr. Safa's book, written in French and apparently a product of French legal training, was also originally a doctoral thesis, to conclude from the preface of Professor Charles Fabia, of the Faculty of Law of Beirut. The second edition, alone available to us, is as mature and skillful a work as any writing on the difficult subject can be. The author, now president of the commercial court of Beirut and a lecturer at the Institute of Political Science in that city, instead of contenting himself with a study of the "theories," *universalité—unité—territorialité*, as was so customary until quite recently, has made a careful investigation of the conflicts cases adjudicated in the now defunct mixed courts of Lebanon, Syria, and Egypt, and has produced a masterly discussion of the problems involved in conflicts cases in bankruptcy.

The first part of the work is a comparative presentation of doctrines developed by the writers and of solutions found in court decisions, statutes, and treaties, to the extent that sources are available in the French language. The second part is an analysis of the court decisions in Lebanon, Syria, and Egypt and an endeavor to see what systems, if any, these courts have followed. At the end of the work, suggestions are made for policies which could be followed in drawing up agreements on conflict of laws between the Arabic states mentioned.

As the author relied on material in French exclusively, what he says about American law is as accurate or inaccurate as the source used. Thus we find repeated (page 108), though with a *contra* referring to an article by the present writer in *Clunet*, that in the United States local creditors are given priority over other creditors. The source is an inadequate report in *Clunet* of *Disconto Gesellschaft v. Umbreit*,[1] 208 U. S. 570 (1907), where the Supreme Court of Wisconsin had given local assets of a nonresident insolvent, first attached by a creditor from abroad and then by a local creditor (his local lawyer), to the latter, and the Supreme Court of the United States held that the local policy of Wisconsin did not violate the Due Process clause of the Federal Constitution. The author is apparently unaware that equal distribution of the local assets could have been secured by a bankruptcy adjudication in the United States. (See the article by the present writer in 4 Bulletin de Législation et de Jurisprudence Egyptiennes (1953) 121, 126). Apart from this mishap with American law, there can only be praise for the endeavor of the author to familiarize himself with the American conflicts rules, which he did by using the French translation of the Restatement of Conflict of Laws. In fact it can be noted, not without satisfaction, that the rules, which the author found in the receivership sections of the Chapter: "Administration of Estates" of the Restatement, have widely influenced his policy recommendations at the end

[1] 35 Journal de Droit International (1908) 1322. For a discussion of the case by the present writer see, 11 Law and Contemporary Problems (1946) at 696, 699.

of the work. While, technically speaking, the sections involved are rules on receiverships and not on bankruptcy, and the translators should not have used the term *faillite* for receivership, the rules there offered are, we think, a fair restatement of what the courts have done also in bankruptcy and more in accord with the decisions than the bankruptcy section, undetected by the author, which is unlikely to survive the revision of the Restatement currently under way.

Dr. Safa's work is meritorious in the first place because it calls attention to the decisions of the Mixed Courts of Lebanon, Syria, and Egypt. These decisions, which are in French, are in collections available in various of our libraries. Some of them throw additional light on the problems which arise in the field, and it is good knowing of them and having them aptly discussed. The work has also the merit of duly emphasizing the difference which exists between the two concepts of territoriality used in discussions of the subject matter, the "territoriality" under the guise of which local assets are reserved for the "local" claims in the case of concurrent bankruptcies, as provided in the law of a number of Latin-American countries, and the other so-called territoriality under which jurisdiction is assumed over local assets, not to give preference to local claims, but to secure equal distribution among all creditors. The author, who is opposed to the first "territoriality," discusses with special care the difficult questions which arise for the admission of claims in concurrent bankruptcies—a topic often neglected in writings on the subject. He is perhaps less successful in his treatment of the subject of foreign arrangements (compositions), but one may doubt that a study of the American cases, for example, would have been of great help.

It is interesting and gratifying that in both books under review, written in very different surroundings, the solutions proposed or favored are realistic and practical and far away from what one used to get, and still occasionally gets, in terms of doctrinal dissertations. Both authors eschew identification with one or the other of the extreme theories and think that the pragmatical rather than the doctrinal approach commends itself in this field. Neither of them, having thoroughly studied the problems involved, seems to have come to the conclusion advanced by some at a recent international meeting that things have become so bad that only a world bankruptcy law, to be applied in a world bankruptcy court, can provide the solution. On the contrary, they seem to favor the traditional remedies.

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KEETON, G. W. *The Law of Trusts. A Statement of the Rules of Law and Equity Applicable to Trusts of Real and Personal Property.* Sixth edition. London: Sir Isaac Pitman & Sons, Ltd., 1954. Pp. lxviii, 499.

FRERE-SMITH, P. *Manual of South African Trust Law.* Durban: Butterworth & Co. (Africa) Ltd., 1953. Pp. xix, 169.

Each of these two recent publications on the law of trusts constitutes, in its own way, an important contribution to the recent literature of this field of the law. Professor Keeton's treatise is a new edition of a work which long ago won recognition as a standard one-volume treatment of the English law of trusts. The fact that the work has gone through six editions in the course of two decades is alone sufficient to demonstrate its popularity. And any examination of its contents shows that this popularity is based on solid worth.

In this edition, the author's general scheme of the preceding editions is retained. Approximately half the pages are devoted to the administration of trusts. The chapter on "Charitable Trusts" has been substantially revised, and a new chapter has been added on "Trusts in the Conflict of Laws." Cases which have been reported since the fifth edition come in for discussion. For example, we have an adequate statement of the significance of the decision in *Re Astor's Settlement Trusts*,[1] on the subject of honorary trusts, or, as Professor Keeton designates them, unenforceable trusts.[2] The book went to press too early to permit any discussion of the so-called Nathan Report on Charitable Trusts.[3]

It is scarcely possible to compare Mr. Frere-Smith's book on the South African Law of Trusts with the treatise of Professor Keeton. Mr. Frere-Smith is doing a first edition of a work which is definitely a pioneering job. Hence we cannot expect the same sort of definitive statements of the law nor organization of the materials. Nevertheless, the author has given us a scholarly, and doubtless accurate, picture of an aspect of South African law which is little known or understood in the Western hemisphere, and perhaps also in other localities.

The first chapter, entitled "Introduction of Trust Practice," seems to be chiefly an account of the origin of the trust in South Africa. The author tells us that the trust system of South Africa "has been developed as judge-made law growing from the Civil law institute of fideicommissum, as modified in Holland up to the beginning of the nineteenth century." An important element in this development of trust law was the use of English forms in the drafting of instruments. When these came before the courts for interpretation, some trust doctrines were recognized in an effort to give effect to the instruments.

The conscious recognition of the trust in South Africa, the author tells us, dates from the decision in the case of *Kemp's Estate* v. *McDonald's Trustee*.[4] This is undoubtedly the leading case on the law of trusts in this jurisdiction, and is referred to on page one as well as on numerous subsequent pages. Although the case is discussed in Chapter VI, the author reserves his full analysis

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[1] [1952] Ch. 534.

[2] P. 123.

[3] See this Journal, Vol. II (1953) 555 *et seq.*

[4] [1915] So. African Law Rep. (App. Div.) 491.

of the facts and holding, for Appendix I. It would seem that this discussion might well have come nearer the beginning of the book.

Mr. Frere-Smith is insistent that the South African law still follows the civil law in that it has never recognized the concept of divided title.[5] But in discussing the *Kemp's Estate* case, he says, "Certainly the result seems perilously near to the division of ownership which is alien to the Civil law."[6] That this, indeed, puts it mildly, is indicated by the statement of the Chief Justice in that case to the effect that "it was quite possible, under the Roman-Dutch law to separate the legal ownership of property from the right to its beneficial enjoyment."[7]

Much of this treatise is devoted to the background and fringes of South African trust law. Relatively few chapters are devoted exclusively to the heart of trust law as understood in the common law system,—namely, the questions of creation, administration, and termination of trusts, though these aspects of the law are, of course, treated. Thus, there are chapters on "Trust Notions of English Equity and the Civil Law," "Fideicommissum and Modus," "Usufruct," "Powers of Appointment," "The Doctrine of Unjust Enrichment," "Death Duties upon Trust Interests," and "Taxation of Trust Incomes." In view of the fact that there are only 126 pages of text, exclusive of appendices,[8] not a great deal of space is left to discuss what this reviewer would call the basic problems of trust law. Nevertheless, with only one leading case, and no clear recognition of trust law until 1915, it may well be that the cautious scholar is compelled to follow this course. In any event, the author is to be congratulated because he has given us a full account of the beginning of South African trust law in its local setting. Doubtless as that law grows, further editions will record its future development.

LEWIS M. SIMES*

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[5] "The Civil law conception of ownership as an indivisible unity of incidents was adopted in Roman-Dutch law and has always been recognized in South Africa as essential." p. 57.

[6] P. 56.

[7] Kemp's Estate v. McDonald's Trustee, [1915] So. African Law Rep. (App. Div) 491, at 503. See also, the discussion of this case in Lee, Introduction to Roman-Dutch Law (5th ed., 1953) 387.

[8] There are three appendices. The first, as has been seen, discusses the case of Kemps' Estate v. McDonald's Trustee. The second is an opinion by Professor H. F. W. D. Fischer of Leyden University, on Roman-Dutch Fideicommissary Law and Practice in Holland during the 18th Century. The third is a collection of forms, or, as the author calls them, "Precedents," for use in drafting trust instruments.

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EHRENZWEIG, A. A. *"Full Aid" Insurance for the Traffic Victim.* Berkeley: University of California Press, 1954. Pp. xi, 72.

SUZMAN, A.—GORDON, G. *The Law of Compulsory Motor Vehicle Insurance in South Africa. A Treatise on the Motor Vehicle Insurance Act.* Cape Town: Juta & Co., Ltd., 1954. Pp. xii, 288.

The ever-mounting holocaust on the highways of the United States resulting from the operation of motor vehicles has for many years constituted a challenge to experts in various fields. Highway builders, traffic specialists, automobile designers, and others have given attention to the matter. Their efforts have not been entirely without success but the problem is far from solved. The rapidly growing number of vehicles in use, the increase of population, the larger proportion of the public owning and driving automobiles and, to some extent, the growing destructiveness of motor vehicles, leaves a sickening residue which ultimately calls for the intervention of the social engineer. Recognizing that there is inevitably going to be a heavy loss of life and limb as a result of automobile accidents, the question is, "What can be done to improve the manner in which that loss is distributed in society?" Those interested in this question will find diametrically opposed approaches in two works published in 1954. One is "Full Aid Insurance For The Traffic Victim" by Albert A. Ehrenzweig, Professor of Law in the University of California, and the other is "The Law Of Compulsory Motor Vehicle Insurance In South Africa," by Suzman and Gordon, both South African lawyers.

Professor Ehrenzweig's proposal is a projection of the philosophy expressed in his earlier provocative work entitled, *Negligence Without Fault.*[1] He indicts the present method of handling automobile accident losses as slow, wasteful, and uncertain. He regards the ordinary negligence suit as a gamble, the outcome of which is determined by perjury, innocent misrepresentation, confusing rules of evidence, the ambiguous or fictitious concept of "negligence," and "a multitude of irrational and incidental factors." The results are that the verdict of the jury may vary capriciously between "a pittance and a windfall" and that the law "has continued to deny relief to what is probably a majority of those injured by automobiles." The most unfortunate casualties of all are those injured by hit-and-run and judgment-proof drivers. These victims have not even the dubious relief of the negligence action.

Professor Ehrenzweig examines alternative solutions. He finds no satisfactory prospect in compulsory liability insurance, unsatisfied judgment funds, assigned case plans, or financial responsibility laws. The answer lies in "loss insurance," a form of accident insurance which would gradually and cautiously replace liability insurance and tort liability as a basis for distributing losses caused by automobiles. He calls this "full aid" insurance, a term derived from the "first aid" clause in current liability insurance policies. Briefly, the idea is that any automobile owner or operator who carries full aid insurance in statutory minimum amounts for injuries caused by his vehicle would be relieved from his common-law liability for ordinary (in contrast to criminal) negligence. Any person injured by an automobile covered by such insurance would receive "full aid" in the form of a weekly indemnity, with appropriate provision for partial or total disability (temporary or permanent), death bene-

[1] Berkeley; University of California Press. 1951.

fits, and medical and rehabilitation benefits. Persons injured by uninsured automobiles would have recourse to an "uncompensated injury fund" administered by the automobile insurers licensed in the state. This plan, Professor Ehrenzweig believes, would have the virtue of being a voluntary scheme of private insurance with a minimum of state control; would not impair but would add to existing incentives for greater safety; would not involve any legislative interference with the law of torts but would eliminate the gamble of the negligence suit; would save expense to the public; would make for easy determination and equality of minimum awards, leaving additional coverage optional with those who desire it; and would result in the widest possible coverage of the public.

As an intermediate trial run it is suggested that automobile liability insurers experiment with the plan by inserting in their policies a full aid clause giving the accident victim an option to request payment of the specified benefits in consideration of his waiver of any tort claim he may have against the insured. The author predicts that the majority of accident victims would elect the certain benefits and give up the tort claim.

Professor Ehrenzweig has set forth the foregoing provocative ideas in a compact little booklet containing 40 pages of text and 20 pages of notes. The writing is in clear and simple style and seems to be directed at the general public rather than at lawyers or insurance men. Although his mode of expression is positive and many of his remarks are in conclusive form, the author frankly states at the outset that he is trying to formulate "a new approach which, *if found feasible in the light of facts and figures yet to be gathered and studied*, would give private insurance a chance to promote social progress without state interference." (Emphasis supplied.) Readers whose initial reaction to this general approach is adverse would do well to review the *Report by the Committee to Study Compensation for Automobile Accidents* of the Columbia Council for Research in the Social Sciences,[2] and should also examine the more elaborate statement of Professor Ehrenzweig's basic thesis in *Negligence Without Fault*. The proposal he makes deserves careful consideration and impartial analysis as a serious effort to find a practicable solution to one of the most perplexing domestic problems confronting America today.

The South African plan follows more conventional lines. The Motor Vehicle Insurance Act came into operation in South Africa in 1946. Similar legislation was enacted in Basutoland, the Bechuanaland Protectorate, and Swaziland. The plan requires that all motor vehicles (with specified exceptions) driven on public roads be insured so as to compensate any "third party" for any loss or damage which such third party suffers as a result of bodily injury to himself or the death or any bodily injury of any person. The Act adopts the novel principle of insuring the vehicle and not the owner or driver of the vehicle. A

[2] Philadelphia; Press of International Printing Co., 1932. See also French, The Automobile Compensation Plan, New York; Columbia University Press, 1933.

vehicle may be exempted from the obligation to insure if the owner deposits with the Minister of Transport a prescribed sum of money or appropriate security of equivalent value. Registered insurance companies are obliged to insure all applicants unless it can be shown that the vehicle is unroadworthy or will be driven by someone who will endanger the safety of the public. Once the insurance has been effected, the relationship between the owner and the insurer becomes statutory rather than contractual; the insurance cannot be cancelled even by mutual consent; and, except for a limited number of unusual situations, remains binding for the full statutory period.

Compensation is payable only "if the injury or death was due to the negligence or other unlawful act of the person who drove the motor vehicle or of the owner thereof or his servant in the execution of his duty." Thus it is clear that there is no departure from conventional tort principles. The injured person has no greater rights against the insurer than he would have had against the person responsible at common law. Any defense which the owner or driver might have invoked against the claimant is available to the insurer. The authors state that in the bill originally introduced these limitations did not apply and the third party was in effect given greater rights against the insurer than he would have had at common law against the person causing the damage, but that this feature of the bill was deleted after it had been referred to a Select Committee. They add, "The question of whether there should not be an absolute liability in respect of all personal damage caused by or arising out of the driving of a motor vehicle merits serious consideration."

The Act applies only to damage to the person. Claims for damage to property must be brought against the actual wrongdoer or other person responsible and cannot be included in any claim against the insurer.

To protect the public against injury by uninsured vehicles, the registered insurance companies operating within the Union of South Africa have entered into an agreement with the Minister of Transport which in effect creates an unsatisfied judgment fund in which all registered insurers participate.

This book is written for lawyers rather than for the general public. It is a comparatively small work but seems remarkably thorough and complete. The wealth of decisions cited, together with the copy in the Appendices of the Act and the Regulations issued thereunder, ought to make it a very valuable handbook for any practitioner in this field. One cannot gain any impression from this book of the social consequences of the Act since its adoption, but one does gain the distinct impression that the scheme is a workable one which does not inevitably bring the evils ascribed to the system by opponents of compulsory insurance plan. One might wish that this little book could have been read by the members of the New York State Senate before they defeated by a close vote a comparable measure before them in March, 1954.[3] It ought to be read by all who are seeking light on the problem, whatever their point of view, for

[3] The New York Times, March 20, 1954, p. 1, col. 4; *ibid.* March 21, 1954, p. 1, col. 8.

it may ultimately have an important effect on the direction of our thinking in this country.

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PAULICK, H. *Die eingetragene Genossenschaft als Beispiel gesetzlicher Typenbeschränkung*. Tübingen: J. C. B. Mohr 1954. Pp. xv, 204.

The incentive to the co-operative movement in Germany was due to the unremittent activity of Schulze-Delitzsch and Raiffeisen towards the middle of the 19th century. The former promoted small industrials, mercantile, and consumers' co-operatives, while the latter started rural credit co-operatives to meet the need of small farmers for credit and for adequate organization for selling their products. In the course of further evolution, it became necessary to create possibilities for the "little man" to compete with gigantic capitalistic enterprises and to secure cheap purchasing possibilities for small households by means of association. This led to the rapidly developing importance of the co-operative movement in the second half of the past and the first half of the present century. The National Socialist legislation dissolved the consumers' co-operatives in the early forties, but they were revived after Germany's liberation in 1945 and have since been growing both in number and importance.

The basic legal source of the German law on co-operatives is still the Statute of May 1, 1889, preceded and amended by numerous Acts, among which the Statutes of December 12, 1933 on the liabilities of the members, of November 30, 1934, on supervision, and an Ordinance of April 13, 1943, may be mentioned.

Paulick's work deals with the law of incorporated co-operatives in Germany "as a sample of statutory type-restriction." It extends not only to co-operatives, but contains also thorough dogmatic analyses of other corporations. He discusses mainly the relation between their form and the purpose of their enterprise and also the rights and obligations of their members. The term "type" is used by Paulick as a synonym of the word "model;" the term "statutory type restriction" as an antithesis to "statutory freedom of type." By the latter term, he wishes to characterize such corporate forms as can be chosen by the parties for several purposes, and/or where one specific goal can be attained by choosing either one of several forms of associations. "Compulsory type" means that a specific form of corporation is mandatory for an enterprise to be founded for a special purpose. For instance, insurance enterprises can be organized in Germany only as stock corporations; with the exception of those created for the business of mutual insurance, for which a special form of associations is compulsory. The term "statutory type restriction" covers, according to his terminology, the cases in which the legislator subjects the use of a certain form of corporation to a statutorily exactly defined purpose and denies the parties—if they choose that form—in principle all liberty of modelling in respect to their contents (p. 24). He refers—in order to clarify this definition—to two examples. The "incorporated association" as provided by Para. 21 of the Ger-

man Civil Code (BGB) is admitted only if not organized for pecuniary profit. The "incorporated co-operative" is defined by Para. 1 of the Statute of May 1, 1889, as an association formed for the purpose of "the furtherance of the earnings or the economy of its members by common business management." Both goals are also attainable through other forms of corporations. But neither the "incorporated association," nor the "incorporated co-operative" can be used for other purposes, e.g. to make profits for the co-operative in excess of the legally permitted reserves. Paulick's book contains elaborate details connected with this idea and its ramifications. As a matter of fact, he has to admit that there is an exception to the above quoted legal definition of the German Statute on co-operatives,[1] and from the inference deduced from it by Paulick. According to him, identity of the entrepreneur and the patrons is the basic idea of the "statutory type restriction" as realized by the co-operative corporate form. The German law explicitly prohibits only certain special categories of co-operatives from doing business with non-members, but its interpretation by court practice and literature tolerates such usage in general. According to Paulick, such power granted to co-operatives "is apt to lead to a hollowing out and to diluting the concept and the idea of the co-operatives."[2] On the other hand, he points to the fact that in most European countries where the law admits business with nonmembers (except the French Statute of 1947 containing a general prohibition) such business does not exceed 1–3 per cent of the total sales of the co-operatives and is not prejudicial to the development of the co-operative idea.[3] Practical life arrives sometimes at satisfactory solutions even by breaking through theoretical categories.

Chapters comparing co-operatives with other corporations and associations of civil and commercial law, pointing to the differences involved in the rather personal and not capitalistic relation between the co-operative and its members,[4] as well as suggestions about the reform of the law on co-operatives and their taxation, contain interesting complements to the value of Paulick's work.

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[1] Similar to those contained in various American statutes, e.g. the Consumers' Cooperative Act of the District of Columbia (Pub. No. 642, 76th Cong. 3d session ch. 397) Art. II, sec. 3.

[2] P. 130.

[3] P. 129–132. Under the German tax laws certain privileges granted to co-operatives are not applicable to those doing business with non-members.

[4] A co-operative can be formed in Germany by seven persons without any contribution of capital. It can exist and do business also without incorporation; but a nonincorporated co-operative does not qualify as a legal entity.

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SCHÖNKE, A. (ed.) *Die strafrechtlichen Staatsschutzbestimmungen des Auslandes.* Bonn: Ludwig Röhrscheid Verlag, 1953. Pp. 155.

When the Society of Comparative Law met at Berlin in the autumn of 1952, its division for the study of criminal law (*Fachgruppe für Strafrecht*) resolved

to follow a suggestion of the *Bundesministerium für Justiz* and to publish, in a German translation, a collection of the most important foreign laws for the protection of the state. The results of this undertaking, supervised by the Institute for Foreign and International Criminal Law of the University of Freiburg and edited by the late director of the Institute, Professor Schönke, are published in the present volume. Excluding countries for which the relevant statutes are available in German, it includes three groups of non-German laws: I. The European Group; II. The non-European Group; III. The Anglo-American Group.

Ad I. The European group comprises laws of Belgium, Finland, France, Greece, Italy, Norway, Sweden, Spain, and Turkey. While there are several monarchies in this group, there is only in Belgium extensive protection of the sovereign and the royal family. On the other hand, states in which comparatively new types of crime such as "collaboration" developed during war and subsequent occupation, show greater changes in their criminal laws than countries with a steadier history. Of the laws enumerated, the Italian draft of a reformed Criminal Code contains the best definitions and organization: Title One covers Crimes Against the Existence of The State: crimes against the personality of the state under international law, i.e., which may destroy or undermine the very life of the state, but always from abroad or with foreign help; crimes against the *inneren Bestand des Staates*—as the German translation reads—i.e. hostile actions against the state but without foreign assistance, including revolts; attempts against the life of the president of the Republic, as well as the lesser delict of publicly blaming the president for actions which he undertook under the constitutional responsibility of the cabinet; and, finally, crimes against foreign states. The legal qualification of a conspiracy as requiring at least the participation of three persons, is of interest. Title Two reflects the long dictatorial period and the difficulties with communism in Italy; it deals with Crimes Against Constitutional Freedoms. The names of the specific offences in this title speak for themselves: (1) crimes of public employees against freedom of the person and the dwelling; (2) against freedom of opinion; (3) against freedom of assembly and union; (4) against freedom of religion; (5) crimes of public employees against freedom of correspondence; (6) against equality of the citizens; (7) against freedom of election; (8) other crimes against constitutional freedoms. The death penalty is generally abolished.

The criminal codes of the Scandinavian countries clearly show the impact of occupation and Quislingism; even the new Swedish code takes precautions against crimes under which Sweden's neighbors suffered, although its sanctions are comparatively less severe. The treatment of crimes against the monarch varies in the different countries; unlike Belgium, Sweden does not subject persons who murder or wound the king to capital punishment, but enumerates all these felonies and the lesser crime of *lèse majesté* under the heading High Treason, as in the old Austrian criminal code. On the other hand, *lèse majesté* is not proscribed in the British Treason Acts, issued at different times, which, however, include attempts against the life and the liberty of the sovereign.

The Spanish code is typically fascistic; Chapter XI, Illegal Propaganda, criminally sanctions any propaganda of *every kind and in any form* (art. 251) *aiming at* (lit. 2) *the destruction or weakening of the national sentiment.* Thus, an unpatriotic short story writer could easily be prosecuted, if his stories weaken the national sentiment.

Turkey (Art. 163) prosecutes those who attempt to co-ordinate the organization of the state with religious denominations contrary to the principles of laicism.

Ad II. The non-European group is essentially Latin-American. Only three countries are included: Argentina, Chile, and Costa Rica. One is amazed to find the latter small nation the severest; its Penal Code punishes any action against its sovereignty with *prison* from 15 to 30 years. Article 333 contains 16 *literae* defining treason, and yet *litera* 14 generally applies to any person who "in any way acts against the integrity of the state territory or against the sovereignty of the state or contributes to such action." Probably, in old colonial times, rebellions might be started by a person (Article 357) "Who . . . excites the people by the ringing of chimes or other noises."

An Argentine law of July 26, 1951 punishes, "an Argentine citizen who causes by any means whatsoever the applications of political or economic sanctions against the Republic." Such an article would prohibit any appeal to the United Nations, as may occur as soon as the United Nations have created an agency corresponding to the European Commission for Human Rights and the European Court for Human rights, contemplated by the Convention of Rome, of November 4, 1950.[1]

Ad III. In the Anglo-American group, while the Dominion laws are fairly new, the United Kingdom itself bases its protection mainly on the Treason Acts of 1351, 1554, and 1791. Treason is any act aiming at the sovereign's life, health, or freedom, any act involving warlike actions against the sovereign, and finally joining the sovereign's enemies. It is of interest that the slaying of the chancellor, the chamberlain, or one of the judges of the royal courts by a *man* is regarded as treason (25 Edw. III stat. 5, ch. 2); a modern prime minister may belong to this group by virtue of his office as "Chancellor of the Treasury;" however, his being murdered by a woman would not be regarded as treason.

The British laws do not distinguish between high treason (crimes against the external security of the state) and treason (crimes against the inner security of the state). Certain new qualifying definitions were added to the British concept of "treason" under Victoria and George V, but not until world war II was the Treachery Act (3 and 4 Geo 6 c. 2) passed, penalizing acts endangering the operations of the armed forces without imperiling the sovereign or his advisers.

While Australia and Canada generally follow the British legal principles,

[1] *Cf.* Walter Schätzel, Der Internationale Schutz der Menschenrechte. Festschrift für Friedrich Giese. Verlag Kommentator, Frankfurt a.M., p. 229.

but with more modern definitions (Australia: Crimes Act 1914–1934; Canada: Revised Statutes, chapter 146, as of January 1, 1953), it is of interest that the Australian Act enumerates in Section 24 a (2), certain actions as lawful and permissible; this seems surprising in a democracy of the British type.

According with the importance of the United States, the provisions in the United States Code and the more recent legislation against un-American and revolutionary activities are translated and annotated. Unfortunately, the General Espionage Act of 1917 and the Atomic Energy Act of 1946 are not reproduced, not even in part, although both laws occupied an important rôle during the Rosenberg controversy.

In the very brief chapter VI of the India Act, No. XLV, only warfare against India is a capital crime; all other acts against the security of Gandhi's and Nehru's state are subject to comparatively light sanctions.

Although all translations are into German, the usefulness of the volume, which is truly a work of basic value in the field of comparative law, is not restricted to German-speaking countries—anyone who knows German may read and study it with great profit.

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CARR, R. K. *The House Committee on Un-American Activities.* Ithaca: Cornell University Press, 1952. Pp. xiii, 489.

Professor Robert K. Carr's study of the Committee on Un-American activities is most timely; in some 500 pages, it makes a serious contribution to a problem too often superficially regarded by the great newspapers throughout the world. Written in 1950 and 1951, this work antedates McCarthy's celebrity, which it scarcely takes into account. Indeed, it was only on February 9, 1950, that for the first time and by chance, the fiery senator from Wisconsin had occasion to concern himself with anti-American activities; invited to speak at a dinner at Wheeling, West Virginia, and needing a topic, the senator asked the Republican National Committee for a subject. He was advised to discuss "Communism in the Truman Administration." The success of this speech was prodigious; McCarthy was on his way. In a few months he had acquired world-wide fame.

A principal virtue of this work is to recall that witch-hunting has existed for a long time across the Atlantic. In 1937, the first committee on Un-American activities was created, better known under the name of its chairman, the Dies Committee. Constantly renewed until 1944, it became a permanent committee at that time under its present well-known name, Un-American Activities Committee.

The author commences by showing the importance in American constitutional history of committees of inquiry, the first going back to 1792. From the beginning, the power of these committees gave rise to passionate debates in

Congress, evidencing the importance which this institution immediately acquired.

After consideration of the means, the author passes to an examination of the specific provisions applicable to subversive activities. It is striking how much this problem has always haunted Americans. Why has this country, so rich, so proud of its living standard, so conscious of its superiority, been so fearful? Americans seem to be conscious of their privileged but at the same time unsettled position in relation to the other continents and, in consequence, of the precariousness of their situation. Their tendency to isolationism, the way in which they close their frontiers to immigrants, and the difficulties which they make for ordinary tourists, are mere defense mechanisms. The Committee on Un-American Activities reveals the same psychology. Professor Robert K. Carr, nevertheless, shows a certain embarrassment in accepting such an analysis, which would warrant belief in a possible contamination of the American people; he prefers to reduce the activity of this Committee to the struggle against the dangers of espionage or of sabotage to which criminals subject society. The activities of Senator McCarthy have shown the true measure of these investigations.

After having reviewed with the greatest care the results obtained by the Committee from 1945 to 1950, emphasizing such cases as that of Alger Hiss, the notoriety of which has since been considerably superseded by the Rosenberg case, the author examines without prejudice the composition of the personnel and the staff of the Committee; while admitting that it contains no fanatic, he also recognizes that the average has been quite low. A chapter is devoted to the investigative procedure, giving interesting details on the manner in which the interrogatories are conducted. The relation between the Committee and the press is given special consideration, inasmuch as publicity is a vital instrument for this form of investigation, founded upon a general psychosis of danger. Finally, a concluding chapter is devoted to the relations of the Committee with the courts. As Congress has not desired to limit the powers of the Committee, there has been no other mode of defense against its indiscretions than to have recourse to the judicial branch. Thus far there seem to have been relatively few judicial decisions concerning this subject matter.

Professor Carr is conscious of the dangers inherent in the system; he indicates very well that the problem consists in finding a just mean between the necessities of national security and the interests of individual liberty; nevertheless, he concludes that, in the activities of the Committee, taking everything into account, "the good" outweighs "the bad." Mr. McCarthy's attacks, severely qualified as indecent, still pass as exceptional improprieties. The author did not seem to suspect how far they were going to reach. His judgment in 1951, qualified, but finally favorable to the Committee, would perhaps be altogether different in 1954.

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ECKHOFF, T. *Rettsvesen og rettsvitenskap i U.S.A.* Oslo: Akademisk Forlag, 1953, Pp. xv, 341.

The author states in his preface that work on his book was commenced during a period of study under the Otto Løvenskiold Fund in the United States from 1947 to 1948. His original intention was to write a law review article about certain new tendencies in American legal philosophy. But he soon found that it was difficult to present a satisfactory picture of the present legal philosophy without discussion of the traditions from which it arose and the practical problems with which it has been confronted.

The author states: "This book is not intended as a review of existing American Law. Its aim is in part to give an introduction to American legal methods and thought, and in part to present materials and point to problem situations which perhaps may give impulses to discussions of corresponding questions here at home." In the opinion of the reviewer, the author has carried out his aims in superlative fashion.

Chapter two, following an initial survey of the historical background, is entitled "The Legal System and the Juridical Techniques." This is a lengthy chapter in six sections covering 170 pages, the longest of the book. The second section deals with the relation between the federal government and the states with respect to enactment of laws and judicial procedure. Sixteen pages are devoted to the Commerce Clause. There is no similar discussion of the power of the Federal Government to tax and of the amending power. The third section deals with the growth of the law. The adoption of the Federal Rules of Civil Procedure is discussed. There is no discussion of the Federal Rules of Criminal Procedure, although reference is made to the adoption of the Rules for Procedure After Verdict in Criminal Cases in 1934. The fourth section deals with judges and juries. Concerning federal judges he concludes: "On the whole the individual judges—including those of the lower courts—enjoy high respect both for industry and integrity. But this does not prevent the decisions of the courts from being the object of criticism in the law reviews and the daily newspapers—a criticism which sometimes may be both sharper and less respectful in form than we are accustomed to in Norway." In his discussion of the jury, the author makes one of his very few incorrect statements as to American law. He states that "after the evidence for both sides has been concluded" the judge may direct a verdict. The fifth section discusses the doctrine of precedents and adjudication by the courts. He points out that "judges and their activity are the central subject for legal science, legal philosophy, and instruction in law in the United States." The history of *stare decisis* in England and the United States is discussed, as is the meaning of "holding" and dictum; and whether judges "find" the law or make it. He concludes that there is no essential unlikeness between American and Norwegian adjudication with respect to the frequency with which precedents are expressly overruled. "Possibly the Norwegian Supreme Court in recent years has been somewhat less hesitant expressly to overrule its prior decisions than most of the highest American courts." Yet there are some cases where American courts have gone further

than Norwegian courts. For example, if *Erie v. Tompkins* had come up in Norway, since the prior rule represented a century of practice, a Norwegian court would have held, even if it regarded the practice as unfortunate, that there was a binding rule of customary law which could be changed only by statute. Legal fictions have played a more significant role in the United States than in Norway. But the author cautiously adds: "One must be aware of the possibility of mistake as it is easier to discover another's fictions than one's own." The most significant difference between American and Norwegian adjudication is that the multitude of prior precedents is so much greater in the United States. This means that that the Norwegian judge has a greater degree of free discretion. The sixth section deals with judicial interpretation of statutes and the setting aside of unconstitutional laws. He concludes that the doctrine of *stare decisis* is and ought to be applied at least as strongly to precedents involving statutory construction as it is to precedents involving merely the common law. Legal-political considerations enter into American statutory interpretation much less than in Norwegian statutory interpretations, and also less than in common law cases or constitutional law cases in the United States.

The third chapter is entitled "Legal Philosophy," and covers 131 pages. With the coming of Holmes, "America is not simply on the receiving end from Europe, but also has something to contribute." To the criticism that has recently been directed at Holmes by such as Ben Palmer, for undermining morality and paving the way for fascism and communism, he makes answer as follows: "The cricism is to a large extent based on the same misunderstanding which we are acquainted with from discussions at home: that to depart from certain metaphysical conceptions over moral relations is tantamount to moral weakness. Holmes' life and learning is in reality a good example to show that there is no such relation." Realism and the opposition to it is thoughtfully dealt with in eleven pages. While admitting that the term "realism" is not altogether a precise one, he finds that realists have certain things in common. "All of them are disposed to be strongly anti-metaphysical, and seek support for their theories in controllable data. Most of them favor broadening the scope of activity of legal philosophy rather strongly. They do not, like so many earlier theoreticians, wish to concentrate all attention upon adjudication but wish to cast a glance at the administration of the law and at the social background of the law. They seek to illuminate this subject matter with methods and approaches from modern logic, psychology, sociology, and ethnography." He points out that recently the word "realism" is not used as much as it used to be. Felix Cohen talked about "the functional approach." Jerome Frank talks about "constructive skepticism." McDougal talks about "policy science;" and writes as if realists are a group to which he himself does not belong. Although Lon Fuller is further from realism than any other of these mentioned above, "his conceptions are rather strongly stamped with the tendencies in the newer American jurisprudence of which realists are the chief advocates.

This is especially true as to his well known article 'Legal Fictions'." In recent years, natural law, especially Neo-Thomism, has played a large role. The author makes clear his preference for realism over natural law. He points out, however, that often both groups will arrive at the same practical results. But in some cases, there will be a difference as "the advocates of Natural Law have a disposition to regard their own preferences as universal truths." The sixth section discusses the relations between jurisprudence and sociology. "Some of the most forward-looking proponents for bringing together law and sociology were Herman Oliphant, Walter Wheeler Cook, Hessel E. Yntema, and Underhill Moore." Reference is made to the work of the Johns Hopkins Institute of Law and the Yale Law School. The work of Underhill Moore is described in considerable detail. He discusses the writings of Lasswell and McDougal. He concludes that little has been done to carry out their program as set forth in their article "Legal Education and Public Policy," 52 Yale L. J. (1943) 203. Their program as set out in 56 Yale L. J. (1947) 1345 "is even in a higher degree stamped with great pretensions and happy optimism." The seventh and final section discusses the functions of law. Attention is given to Llewellyn's concept of "law jobs." Also considered are Jerome Frank's theories about the illusion of certainty of law and law as father-substitute.

I have found this book to be most interesting and stimulating. I should advise one about to commence the study of Scandinavian law to read this book first. It should serve as an excellent bridge between Scandinavian law and Anglo-American law. For Scandinavian readers, I recommend it as an excellent and accurate introduction to American law.

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CAHILL, F. V. JR. *Judicial Legislation. A Study of American Legal Theory.* New York: Ronald Press Co., 1952. Pp. 154.

This book, of modest dimensions, gives an excellent account, objective and readable, of the evolution of American legal thought during the last thirty years on what is termed "judicial legislation."

This subject, it is not astonishing, has furnished the United States a much more abundant and more impassioned literature than elsewhere.

Anglo-Saxon law is, in effect, a jurisprudential law. Its essential framework has been created by judicial decisions which, under the theory of precedent, in an important measure have the force of law. Also, the legislature, intimidated by the prestige of the judges, scarcely ever dares to formulate principles. The laws most frequently have the semblance and scope of administrative regulations. If perchance they venture some generality, they do so less to formulate rules than to indicate general norms of conduct, which, as for example the antitrust laws, leave an enormous power of interpretation to the courts.

Moreover, in the United States, the judge is the guardian of the Constitu-

tion, which is of large importance in his activity; the application of the constitutional texts to the problems of today requires considerable freedom of interpretation, greatly exceeding what we term interpretation.

The judicial power thus has in the United States substantial political influence; it constitutes in the full meaning of the term an independent branch of government, superior in a sense to the executive and legislative powers, since it can paralyze both of them. It is what Edouard Lambert called, "Government by Judges."

Leaving aside the problem of judicial selection, the author undertakes to present an impartial resume of American thought on the methods of judicial work and to mark its stages in the twentieth century. At the beginning of the century, conceptual theories and theories of natural law were still current. The judge, it was said, "discovers" an immanent law, in a sense inherently necessary: the common law. For this purpose, he utilizes legal concepts, which have intrinsic value, deserve respect, and are definitive components of law.

Then came the sociological school of Roscoe Pound, Oliver W. Holmes, Cardozo, and Harlan Stone: the tribunal is deemed, so to speak, a public balance. All the social interests involved in litigation being assembled on the two scales, the judge registers what the pointer shows, indicating the resultants of often opposed forces. In the course of time, it is succeeded by the realistic school (with multiple shadings). This is the period of Karl Llewellyn, Jerome Frank, Joseph Bingham, Arthur Bentley, John Dewey, Edward Robinson, Thurman Arnold, Fred Rodell, etc. . . . This "school" more or less energetically denies the value of legal "concepts," which at a certain stage it goes even so far as to consider false appearances. It investigates all causes of the attitude of the judges and, to this end, systematically studies, outside of the texts of the judgments, all facts which may have influenced the courts. It then essays, in the manner of meteorology, to predict more or less successfully the attitude of the judges in later cases, under such or such circumstances. It even goes so far as to consider that the law is nothing else than such prediction. In this the influence of the school of behaviorism in psychology may be observed, as well as a natural reaction, even when it is exaggerated, to the fact that judges, constrained by the needs of a dynamic society in ultra-rapid evolution, have created—and often improvised—much law—in a manner too obvious not to pose for all citizens problems of the greatest importance both as respects the nature of law and the place of the judicial power in the democratic state.

This little book, well-informed, clear, and most precise in its shadings, will furnish attractive and fruitful reading for French jurists who have at their disposal in their mother tongue only a relatively limited literature on these problems.

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Book Notices

Das Zivilgesetzbuch von Griechenland (1940) mit dem Einführungsgesetz. Übersetzt und eingeleitet von Demetrius Gogos. Berlin: Walter de Gruyter, Tübingen: J.C.B. Mohr (Paul Siebeck), 1951. Pp. viii, 308.

The Max Planck Institute of Foreign and International Private Law, which is under the directorship of Professor H. Dölle, has commenced its series of publications, *Materialien zum ausländischen und internationalen Privatrecht* with the German translation of the Greek Civil Code of 1940 by Dr. Demetrius Gogos, of Munich University. The translation is preceded by a brief introduction written by the translator which gives the history and general features of the Greek Civil Code.

Ever since the Greek War of Independence, 1821, it was the desire of the new state to codify its civil law. Several commissions were in fact set up for this purpose. The last of these commissions was formed in 1930 and its members were Messrs. Triantaphyllopoulos, Balis, Maridakis, Demertzis, Thiveos. Their aim was to codify the Roman-Byzantine law which was in force in Greece since the time of Justinian.

The draft prepared by this committee was revised and modified by Professor Balis in 1938–1939 and was promulgated on April 15, 1940. It was the definitive text prepared by Professor Balis which came into force on February 23, 1946. It must be pointed out that the Greek Code, with regard to the Greek Consular Courts in Egypt and all the Greek authorities outside occupied Greece, was already in force since July 1, 1941.

In the great family of laws which includes the laws of continental Europe and which I have previously called the "Greco-Roman Family" (*cf.* F. Russell, Review of my *Introduction to Comparative Law* in 2 American Journal of Comparative Law (1953) 93), Greek law, through its thirty centuries of development has retained its autonomous character. The Greek Civil Code of 1940 has not departed from the Greek legal tradition.

The Greek Civil Code has been influenced, indeed, as to its form by the German Civil Code, but not exclusively (*cf. Enneccerus-Nipperdey*, Allgemeiner Teil des Bürgerlichen Rechts, 14 ed. 1952, p. 138; *Koschaker*, Europa und das Römische Recht, 2nd ed., 1952, p. 138). Roman law was in force in Germany before the introduction of the German Civil Code. Nineteenth century German Jurisprudence, the *Pandektistik*, which interpreted Roman law in excellent manner, exercised a great influence on Greek jurisprudence And this explains the fact that the Greek legislator took the German Civil Code as his model. But this does not mean that the German Civil Code was introduced into Greece. A comparison between the Greek and the German Civil Code will show that the technique of the former is the superior; it is simpler and clearer. The same remarks apply to the Swiss Civil Code which, although largely influenced by the German Civil Code, is nonetheless autonomous. It is incumbent on every state which desires to establish a civil code of its own to consider the already existing civil codes of other countries. The translation of Professor Gogos is excellent: it makes the Greek Civil Code available to the comparatists and constitutes a valuable contribution to their work.

PETROS G. VALLINDAS

BRANGSCH, H. *Vorleben und Vorstrafen des Angeklagten als Indizien im englischen Strafprozess.* Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft. Bonn: Ludwig Röhrscheid Verlag, 1953. Pp. vi, 121.

LUKANOW, J. *Der Missbrauch der Verteidigerstellung im englischen und deutschen Strafprozess.* Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft. Bonn: Ludwig Röhrscheid Verlag, 1953. Pp. xi, 116.

The traditional German interest in research in the Anglo-American legal system has acquired practical importance after the occupation of Germany, which has brought American and British courts to that country. Suffice it to glance through the issues of German legal periodicals in recent years to realize how important and widespread has been the influence of Anglo-American legal ideas on German juridical thinking and practice of the law. The studies of our authors are the result of the contact between the German lawyer and the common law.

Brangsch deals with the background and penal record of the accused as part of evidence in English penal procedure, and Lukanow with the abuse of rights and privileges of the defense counsel in German and English penal procedures.

The two problems present some puzzling aspects to the continental lawyer, which could be explained only by reviewing the history of the institutions of English penal procedure, and of the bar and defense. Both works are addressed to the German reader and describe the main features of the English penal procedure to provide a background for the main object of inquiry.

A comparative study of the institutions of the civil law countries may go directly to the heart of the matter. The comparison of civil law with common law requires a much broader approach. For instance, in the work of Brangsch, the background and the penal record in German law are evidence of circumstances which affect the penalty and application of reformative or preventive measures. Their function in the trial is not connected with the question of responsibility. The function of background and the penal record of the accused in the English trial is far more complicated, and its material connection with the crime for which the accused stands trial is much closer. The same applies *mutatis mutandis* to the work of Lukanov. The fundamental reason for different solutions in English law as regards the abuse of the rights and privileges of the defense counsel is the different role of the judge and the parties during the trial itself. Both English and German law in this respect are vigorously criticized, and Dr. Lukanov's suggestions for reform profit from the discussions in both England and Germany.

In a sense, both studies are comparative, but only the work of Lukanov uses the technique of systematic juxtaposition of German and English institutions. Both works are also of value for lawyers working in the field of comparative penal law, as a source of terminology and bibliography.

The work of Brangsch gives in a separate appendix a very useful selection of excerpts from British statutes, dealing with the background and penal record of the accused in English and German. K. GRZYBOWSKI

MERIKOSKI, V. *Lärobok i Finlands Offentliga Rätt.* Vol. I., Swedish edition by W. A. Palme; Vol. II., translated into Swedish by Herman Koroleff. Helsingfors, 1950/52. Pp. 239; 248.

MERIKOSKI, V. *Précis du Droit Public de la Finlande.* Publication de l'Association Finnoise des Juristes. Helsinki: Akateeminen Kirjakauppa, 1954. Pp. xii, 294.

This treatise by the well-known Finnish scholar of public law readably and attractively presents the outlines of the constitutional, administrative, and fiscal law of one of the world's most sturdily democratic countries. Based upon Swedish tradition and keeping in constant contact with the institutions and experiences of the Continental countries and their highly developed learning, especially in polit-

ical theory and administrative law, Finland has built up a system of government and administration which appears to be eminently well fitted to take care of the difficult political, economic, international, and ethnic problems of that country. In the task of adapting this system to the particularly troublesome needs of the last decades, Professor Merikoski has played a major role. Through publication of Swedish and French editions of his work it has now become possible to profit from the law-creative skill of those men of politics, administrative practice, and learning who have constructed and elaborated the public law of Finland. M. Rh.

BAUDRY, G. *L'expropriation pour cause d'utilité publique*. 3rd edition revised by M. Rousselet, M. Patin et M. Ancel. Paris: Recueil Sirey, 1953. Pp. 428.

The present book gives an excellent survey of the French law on expropriation, i.e. on the exercise of the power of eminent domain in respect to real estate either in favor of public authorities or of private enterprises whose work is of importance to the public in general. The author has succeeded in giving a very clear and concise picture of this complex subject. The difficulty of this task lies in the great number of relevant texts. As a matter of fact, more than half of the space of the book is taken up by the reproduction, either *in extenso* or in excerpts, of the French laws and regulations on the subject as well as of the forms employed in the expropriation procedure.

From the author's summary of all these provisions, it appears that the French procedure of expropriation is designed to give a maximum of safeguards to private property. This inevitably renders the procedure rather cumbersome. After it has been established by the administration (or, in more important cases, by law) that the contemplated expropriation really is in the public interest, the amount of the indemnity is assessed. Only then is the expropriation order made out. This is done by a judge, who has to verify that all the numerous formalities provided in these laws have been complied with. The indemnity is assessed by an arbitral commission, consisting of a judge, two civil servants, a notary-public and a representative of the local taxpayers. They are free to assess the indemnity higher than the price asked by the owner and lower than the administration's offer. The decisions of the commission are subject to review by the law courts—however, such appeals have no suspensive effect. The administration may take possession of the real estate concerned only after the indemnity is paid. While thus the expropriation procedure is very favorable to the owner, the same cannot be said of the rules for assessing indemnity. No indemnity is paid for lost profits even if they were nonspeculative; in case of slum clearance, indemnity is paid only for the value of the building site, but not for the improvements as a rule; at least no account is taken of depreciations of currency in the course of these sometimes very protracted proceedings.

Some other interesting features of French expropriation law may be worth mentioning. If only a part of a site was expropriated, the owner may request that the rest of the estate should be expropriated as well. The former owner has a right of redemption if within a certain time-limit the expropriated estate has not been used for the purposes which motivated the expropriation. When initiating an expropriation, the administration may discontinue the expropriation procedure if it considers that the indemnity assessed is too high. In this case, it has to compensate the owner for the prejudice incurred through the abortive expropriation. If, on account of public works, the value of adjacent real estate increases

by more than 15%, the administration is entitled to claim from the owner concerned the payment of a sum corresponding to the increase in value superior to 15%. The owner may pay this sum in instalments, or may defer payment until the next change of ownership. In this case, however, the administration takes the full increase in value. If the owner prefers, he may have his estate expropriated at an indemnity assessed on the hypothetical assumption that the public work concerned had not been undertaken.

There exist speedier means of expropriation for military and assimilated purposes (e.g., power dams). In such cases the administration may take possession of the expropriated estate after the amount of the indemnity has been provisionally assessed by experts and deposited with the court or paid to the owners. In case of extreme urgency, possession may be taken after a mere inventory of the object of the expropriation. If within a fortnight, the administration does not deposit security for the indemnity with the court, it shall have to evacuate the site. In both cases, the final amount of compensation is assessed subsequently according to the ordinary rules. Acceptance of the provisional indemnity is in no way prejudicial to the owner in this subsequent procedure.

IGNAZ SEIDL-HOHENVELDERN

FRIEDMAN, S. *Expropriation in International Law*. London: Stevens and Sons Ltd., 1953. Pp. xv, 236.

This is the twentieth volume in the series "The Library of World Affairs," published by the London Institute of World Affairs. It initially appeared in French under the title *l'Expropriation en Droit International public* in *l'Egypte contemporaine*, but has since been revised and brought up to date. The work is concerned with positive law applying to direct expropriation, i.e., with measures of a state encroaching upon private property and resulting either from the functioning of its public services, or from a modification of its political or economic structure. Little attention is accorded acts affecting private property which are the result of war measures or of the exercise of contractual rights.

In the nine chapters contained in the book there will be found a thoroughgoing analysis of the policy-political features of expropriation in state practice as well as of the precedents and principles, and of the components or conditions precedent that necessitate fulfillment before expropriation may be said to have legally occurred. Compensation is also treated in the discussion. Expropriation is made out to be an exercise of the jurisdiction which a state is acknowledged to possess by international law, the invocation of which is subject to the objective duty of conforming to international standards of conduct and not causing manifest or violent injustice. The jurisdiction of states in regard to expropriation is further restricted by the duty of avoiding all discriminatory treatment of foreigners, since the adoption of bias would be incompatible with the requirements of international relations and would entitle interested states to complain of the injury it has suffered in the person of their nationals. General and individual expropriation are distinguished, as are socialisation and nationalization. The concept of national policy is shown to be determinative of the attitude of a municipal judge when confronted with the effects of an international measure of expropriation in territory within his jurisdiction. This is because international law contains only fragmentary rules relating to the concept of property, which it does not even define, municipal law presenting, on the other hand, a complete and coherent body of rules defining all aspects of the right of property and determining its juridical basis. In the absence of an international body of economic laws,

none of the varying municipal conceptions are said to be able to aspire to the status of a universal rule of law.

There is a table of cases and diplomatic incidents, a table of treaties, both multilateral and bilateral, and a bibliography of general works, source books, monographs, and articles. The exposition is at once historico-legal, conceptual, and scientifically methodical. This book invites constant reference by those confronted by practical legal problems, researchers, teachers, and students of this important phase of international law.

HILLIARD A. GARDINER

DE FONT-RÉAULX, P. *La Réforme du Contentieux Administratif.* (Décrets des 30 Septembre et 28 Novembre 1953). Paris: Recueil Sirey, 1954. Pp. 59.

The present booklet contains the text of two Decrees of the French Government of September 30 and of November 28, 1953, which has made more profound changes in the jurisdiction of the *Conseil d'État* than any other measure enacted since this institution was founded more than 150 years ago. Hitherto, all law-suits involving the administration, except those of a purely civil law nature, have been brought directly before the *Conseil d'État*, unless a special law allotted the type of case concerned to the primary jurisdiction of some lower administrative tribunal (as a rule, to the *conseils de préfecture*). The amount of administrative litigation increased so rapidly after World War II that the backlog of cases pending before the *Conseil d'État* rose from 15.000 in 1947 to 24.000 in 1953. Some drastic measures were required to remedy this situation. Upon the suggestion of the *Conseil d'État* itself, the government proposed a reversal of the respective jurisdictions of the *Conseil d'État* and the lower administrative tribunals. Due to a cabinet crisis, the proposed measures were not enacted by law but by two government decrees issued in virtue of an enabling law. Under the new system, the *conseils de préfecture* have primary jurisdiction in all cases of administrative litigation (an appeal to the *Conseil d'État* being allowed) unless the matter concerned is explicitly reserved by law to the primary jurisdiction of the *Conseil d'État*. This applies also to litigation concerning *excès de pouvoir* (suits aiming to annul administrative decisions as being ultra vires)—a type of litigation which prior to the reform was almost exclusively reserved to the *Conseil d'État*. As the *conseils de préfecture* in their capacity as lower administrative tribunals previously had jurisdiction merely in lawsuits concerning indemnities for actions of *departemental* authorities and some other not very important matters, this is a very radical change indeed. The status of the *conseils de préfecture* and of their judges is raised by the decrees, the judges now having the possibility of promotion to the *Conseil d'État*. At the same time, the *conseils de préfecture* are named "*Tribunaux Administratifs*," although they continue to exercise the remnants of their original advisory functions to the *préfets*. The *Conseil d'État* retains exclusive jurisdiction over all appeals from the decisions of the lower administrative tribunals, litigation concerning the legality of individual and general government decrees and concerning decisions that apply to a larger part of France than the limits of territorial jurisdiction of one of the *tribunaux administratifs*, as well as certain Algerian and overseas cases. The author has given a very informative commentary on these reform measures. Starting with the origins of administrative jurisdiction in France, he shows the various stages of development of the jurisdiction of the *Conseil d'État*. As the texts of the present reform are recent, the author rightly refrains from a judgment on its merits.

IGNAZ SEIDL-HOHENVELDERN

REUTER, P. *La Communauté Européenne du Charbon et de l'Acier*. With a Foreword by Robert S. Schuman. Paris: Librairie Générale de Droit et de Jurisprudence, 1953. Pp. 320.

This is the first exhaustive study of the European Coal and Steel Community to be published in France, while quite a number of books and articles on the same topic were published in Germany during these last years. The author, who is as familiar with international law as with the economic factors, gives a clear picture of the political and economic conditions, which led to the establishment of the Community. He then examines the various organs of the Community, their relations to each other, to the Council of Europe, and to the individual member States. The author stresses the originality of these relations, which are conceived so as to give the Community a supranational rather than an international character. In the subsequent parts of his study, the author proceeds to examine the application of the economic clauses of the Treaty establishing the Community in respect to coal, steel and scrap, in normal times as well as in times of crisis, and the economic and legal effects of the Community's measures in these fields in the several member countries as well as in third countries. It may be of interest to American readers to learn that the de-cartelization and anti-trust provisions of the Treaty were modelled on the corresponding United States laws and to read Professor Reuter's somewhat critical remarks thereon.

It is hardly necessary to stress the vital importance of this work at a moment when political events appear to give new impulses to the economic co-operation of Western Europe. What can be more necessary at such a time, than a book which explains in such a magistral fashion to one of the nations primarily concerned what has already been achieved in this field and what remains still to be done?

IGNAZ SEIDL-HOHENVELDERN

VON CAEMMERER, D. *Probation. Aufbau und Praxis des englischen Systems der Bewährungshilfe*. München and Düsseldorf: Verlag Wilhelm Steinebach, 1952. Pp. 163.

This study of the probation system in England during the past half century, is one of several studies produced in the Seminar for juvenile law and juvenile court workers of the University of Hamburg. It was sponsored by the Association for Juvenile Courts and Juvenile Court Workers. The Association believed and hoped that the study would lead to a reform of the German law governing the punishment of juvenile criminal defendants. On August 4, 1953, two laws were promulgated in Western Germany providing for a system of parole and probation. (See Wahl, "Probation and Parole in Germany," 18 Federal Probation 38–41 (September 1954)). It should be noted that the author describes only the English system, and does not discuss the German system or compare the two legal systems.

The author divides her book into two parts. Part A covers history and organization and Part B, the practice of probation work. Part A deals with the legal bases, the development of the vocation of probation workers, and the growth of probation work on the basis of the organization of the criminal courts. Part B deals with the functions of probation workers, and the purposes of probation. At the end of the volume a number of key English words followed by the corresponding German words are listed. There is also a three page bibliography, indicating that the author has made use of virtually all the available English materials.

The book is essentially historical and descriptive in character. The author does not undertake to criticize the English system. The book is remarkably free from the metaphysical and highly abstract approaches found in so many books by German authors. It will be primarily useful in Germany, as English and American students will

obviously turn to the considerable materials published in England. One may for example turn to pp. 175–183 of R. M. Jackson, "The Machinery of Justice in England" (2d ed. 1953) for a compact and enlightening discussion of the Probation Service in England. LESTER B. ORFIELD

HAEFLIGER, A. *Der Begriff der Urkunde im schweizerischen Strafrecht.* Schweizerische Criminalistische Studien, Vol. 6. Basel: Verlag für Recht und Gesellschaft AG., 1952. Pp. 76.

Section 110 of the Swiss Penal Code, which provides definitions of various terms of the Code, defines documents as ". . . writings which are intended or appropriate, or marks which are intended, to prove a fact of legal significance." This definition was later imitated in other penal codes (*e.g.*, Polish and Yugoslav), which as a rule, however, dropped the differentiation between the writing and mark, retaining the element of their significance as evidence of a fact of legal nature. Although this provision provides the pivotal point of the study, which was awarded a prize by the Swiss Jurists' Association, in fact, the concept of document in Swiss penal law is marginal to a much broader problem, that of the function of the document in legal transactions, and safeguarding security of legal transactions. Provisions of the penal law in this respect are again closely related to the rules of contracts (statute of frauds) and evidence, and the stricter the provisions of both, the closer the tie between penal law and civil law. Civil law knows various gradations between what is known as the French system, which prescribes written and notarized form for certain contracts, and in civil suits excludes all other evidence but documents on circumstances which should be included in a contract, and the system of the Austrian Civil Code which was perhaps more liberal in this respect than the laws of other countries. There are, of course, in addition to this basic problem, questions belonging to penal procedure such as evidence in the course of trial.

The author introduces the reader to the problem by a review of the history of Section 110 of the Swiss Penal Code and the conflict of opinions concerning its provisions. In later chapters, the present situation with reference to the legal definition of writing and mark, problems of evidence, of documents issued by official bodies and finally, the position of foreign documents in Switzerland are described.

The study recommends itself by precise and concise formulation, copious reference to court decisions and writings on jurisprudence. It is a very useful introduction to one of the finer points of the penal law of Europe, and a tool of reference, containing an exhaustive comparative bibliography on the subject. KAZIMIERZ GRZYBOWSKI

APPLEMAN, J. A. *Military Tribunals and International Crimes.* Indianapolis: Bobbs-Merrill Co. Inc., 1954. Pp. xv, 421.

Few trials in history, whether national or international in scope, have produced the tremendous body of commentary that has been written on the proceedings of the International Military Tribunal at Nuremberg. Much of this commentary has ranged from bitter, even vituperative criticism to equally impassionate apologetics of the legal and moral soundness of these proceedings. Mr. Appleman's work falls in neither of these categories, but is rather an objective and careful examination of the record by an able and experienced American trial lawyer.

In discussing the preliminary work preceding the Nuremberg proceedings, Mr. Appleman touches on some of the interesting and novel problems which confronted the framers of that tribunal's rules of procedure. Of these the most interesting, from the standpoint of comparative law, was the problem of defining the application of the respective spheres of the Anglo-

Saxon and Civil adjective law. In the end, as is well known, the Anglo-Saxon adversary, rather than the Continental inquisitorial type of practice predominated. Considering this circumstance, the performance of some of the German defense counsel, as Mr. Appleman points out, is indeed remarkable.

The highlight of the work is the author's interesting and exhaustive examination of the legal defenses, both substantive and procedural, interposed on behalf of the defendants. As it is on this score that most of the serious criticism has been levied against the rulings of the Tribunal, Mr. Appleman's thorough analysis of these points should contribute in no small degree to the clarification of the issues created by them.

After concluding that the decisions of the Nuremberg Tribunal were basically sound, Mr. Appleman proceeds to an examination of the other principal war trials held in Europe following World War II. For obvious reasons, he does not purport to examine or even summarize all of these trials, the number of which has been estimated in the thousands. His discussion, however, of the principal United States war trials in Europe seems to be rather too terse to afford a basis for their serious evaluation.

Mr. Appleman next takes up a discussion of the organization, procedure and proceedings of the International Military Tribunal for the Far East. This body appeared to have been far more directly patterned after American procedural legal principles than its Nuremberg counterpart, which might perhaps be explained in terms of the dominant United States contribution to the conduct of the war in that theater, or of the equally dominant personality of the commanding officer then in charge.

It is in Mr. Appleman's final chapter that the only disappointment lies; the title of his work suggests a fairly broad treatise on the law governing military tribunals and international crimes. His evaluation and conclusions based on the proceedings he has reviewed, fall considerably short of such a treatise. He is certainly correct in pointing out in this respect that the applicable international case law is indeed meager. A much more exhaustive examination of the available international customary law, however, seems to have been both feasible and indicated.

The rulings of the war crimes tribunals, particularly of the International Military Tribunal at Nuremberg, have raised, both expressly and by necessary implication, many interesting and provocative issues on which authoritative textual discussion is still lacking. Among these are the questions whether, in view of the broad holdings of the Nuremberg tribunals, the defense of *ex post facto* could ever be used as a tenable defense in respect to relatively novel charges of international crimes; to what extent, if any, the *lex loci* could be interposed as a defense to a charge of international crime involving acts which might be valid under that law; and the extent to which the rulings at Nuremberg should be regarded as established international case law with respect to the initiation and conduct of hostilities and the treatment of occupied civilian populations. Mr. Appleman's work does not treat these issues to the extent that its broad title might suggest.

On the whole, the book presents a well-organized and extremely interesting review of the Nuremberg and other war trial proceedings from a fresh and highly authoritative viewpoint. It should be enjoyable and remunerative reading to all who are interested in the proceedings from a legal or an historical standpoint.

GEORGE G. LORINCZI

RUCHAMES, L. *Race, Jobs, and Politics.* New York: Columbia University Press, 1953. Pp. x, 255.

This study seeks to present a comprehensive picture of the effort to achieve fair employment practices through government intervention. It includes a description of the origins, history, and impact upon discrimination of the first (1941) President's Committee on Fair Employment Practice; an evaluation of state and municipal fair employment practice legislation; an analysis of the relationship between such legislation and other social problems; and the history of the movement to achieve permanent fair employment practice legislation on a national level. Major emphasis in the study is placed on the findings of the President's committee regarding the practicability, effectiveness, pitfalls, problems, policies, procedures, means, and forces inherent or encountered in the quest for federal fair employment practice legislation. State and municipal legislation is also treated. While fair employment practice legislation does not limit itself to the colored race, attention is centered on this group because their rights have been the touchstone for the rights of all minority groups in the United States.

Other than the politico-historical account of FEPC, including the dramatic story of Executive Order 8802 prohibiting discrimination in government and defense industry, which account occupies a major portion of the book, some studied conclusions are offered. For one thing, fair employment practice legislation does not undermine our free system of enterprise, for it affects employer practices only when based on discriminatory principles. For another, labor disorders do not follow from FEPC laws, because they are administered with due regard to the necessary elements of education, persuasion, and conciliation. While FEPC was demonstrably successful in only 18.6% of its southern cases, the conclusion that Southern customs and mores nullify all efforts to eradicate discrimination is invalid, for resistance to change is not so entrenched and unamenable to adjustment as to preclude the morally correct choice. The feeling of security stemming from the equalization of opportunity is a condition precedent to the achievement of full employment. Segregation too must be eliminated if nondiscrimination in employment is to be realized. The book has thirteen chapters, a set of notes rich in source material and worthy citations, and an index.

HILLIARD A. GARDINER

FRASCONA, J. L. *Business Law.* Illinois: Richard D. Irwin, Inc., 1954. Pp. xii, 961.

This is a comprehensive volume on business law containing, apart from the text, statutes and a glossary. The topics covered are: Law, Its Administration and Enforcement; Contracts; Agency; Personal Property (Bailments and Sales); Negotiable Instruments; Security; Business Organizations (Partnerships and Corporations); Bankruptcy; Insurance; Real Property; Wills and Decedent Estates; Trusts; and Torts of Importance to the Businessman. Great emphasis has been placed throughout upon logical development of the subject matter and clarity of expression in order to render the book readable and teachable. The end-product is an attractive, comprehensive, and up-to-date text, suitable for reference, as well as pedagogical, purposes.

HILLIARD A. GARDINER

JAEGER, W. H. E. *Law of Contracts.* Buffalo: Dennis & Co., 1953. Pp. xv, 677.

In American legal literature, casebooks devoted to the law of contracts are abundant. Among these the work here briefly reviewed is outstanding for the modernity of its contents. The author's criterion of selection leans towards the most recent cases, presenting these in conjunction with those which, on account of their value as leading or "landmark" cases, can-

not be excluded from a work in a law of contracts. Thus, alongside of such celebrated decisions as those in *Adams v. Lindsell*, *Ayer v. Western Union Telegraph Co.*, *Chase National Bank v. Sayles*, *De Cicco v. Schweitzer*, *Jacob and Youngs, Inc. v. Kent*, *Lawrence v. Fox*, *Taylor v. Caldwell*, etc., numerous recent decisions can be studied (including some from the very year of publication of the work), which perhaps will become equally famous. Among these, the opinion in *Isbrandtsen Co. v. Local 1291, Int. Longshoremen's Ass'n (1953)*, is to be singled out as of great interest for the study of the doctrine relating to so-called contracts in favor of third parties.

Works such as this suggest the great interest which a collection of parallel decisions may present, that is, of decisions rendered by tribunals applying different legal systems, but in cases which present a similar or equivalent conflict of interests. A detailed study among the comparative jurists in different countries would permit determination of the extent to which a difference in what the law *says* is effectively reflected in what the tribunals *do*. We believe that this would constitute an important step towards the elimination both of exaggerated doctrinal generalizations and of avoidable technicalities, appearing in the different systems.

JOSÉ PUIG BRUTAU

BLUME, W. W.—JOINER, C. W. *Jurisdiction and Judgments. Cases and Statutes*. New York: Prentice Hall, Inc., 1952. Pp. 718.

This book for the use of students is adapted to the methods of instruction employed in the United States. In essence, it comprises a systematic selection of extracts from judicial decisions. Throughout, these are supplemented by invaluable reproductions of the texts of constitutions, federal laws, and regulatory materials. To organize these diverse sources, the authors have included numerous notes which furnish the student with complementary information: texts, bibliography, commentaries, as well as many questions providing the instructor with the means to enliven classroom discussion.

The subject treated is particularly difficult in the United States; the principal reasons are: (1) the co-existence of state and federal tribunals; (2) the complex constructions given by the courts to the clauses of the Federal Constitution relative to Due Process and to Full Faith and Credit; (3) the fact that initiation of suit is not an extrajudicial act, but an order to appear issued by the court or, in other words, one which can be delivered only within its territorial jurisdiction. The result is that the problem of judicial competence is presented in the United States in a most special and highly interesting manner.

Works of this nature can be most useful outside the United States, for they contain all the essential sources of the law on a particular subject, grouped together, systematically organized, and easily manageable. The work thus forms an excellent instrument of study, as well as of reference.

PIERRE LEPAULLE

CHAFEE, Z. JR. (ed.) *Documents on Fundamental Human Rights*. Cambridge: Harvard University Press, 1951–52. Pp. 998 (3 vols.)

CAMPILLO SAINZ, J. *Derechos Fundamentales de la Persona Humana; Derechos Sociales*. Mexico City; Editorial Jus, 1952. Pp. xvi, 93.

Dr. Chafee's collection has been prepared by him as Harvard University Professor for a new social science course in Fundamental Human Rights. The present edition is preliminary. In the first of three "pamphlets," the background of the United States Constitution is presented. Appended are comparative English materials and the text of the French *Déclaration des droits de l'homme et du citoyen*. The

second and third parts contain materials on three specific fundamental rights: habeas corpus; prohibition of bills of attainder and ex post facto laws; and freedom of debate in Congress. Added are sections on human rights in recent foreign constitutions and in the United Nations. This added comparative flavor, although most welcome, suffers from the formality of materials. What does, for instance, recitation of Chapter X. of the Stalin Constitution mean, if presented by itself? With all understanding of compilation problems and the fact that these are teaching materials, subject to class discussion, I venture to submit that at least some of the fundamental rights could have been better illustrated by available Soviet cases or excerpts from doctrinal commentaries than by the empty letter of the constitution. Indian and Japanese constitutional provisions are also quoted. The emphasis is indeed on the Anglo-American conceptions. In that area, the volumes are a handy and valuable compilation, interestingly edited.

Dr. Campillo Sainz, Professor of Labor law at the Universidad Nacional Autónoma de Mexico presents the contemporary Catholic case for human and social rights, which is indeed indistinguishable from an enlightened total conception of democracy. His first essay on "Fundamental Human Rights" is characterized by the traditional formula that "it is beyond discussion that man is endowed with rights which the state cannot disavow without acting contrary to its proper goal. . . ." The second essay, on "Social Rights," elaborates the thesis that "social rights are in many aspects the condition and necessary complement for the exercise of civil liberties." French, German, and Spanish writings, as well as the doctrine of the Church, are drawn upon. There is no reference to United States literature or experience in the text, but the pamphlet ends with reference to the Declaration of Independence as a model of synthesis of political and socio-economic rights.

JARO MAYDA

BRYSON, L. & al. (eds). *Foundations of World Organization: A Political and Cultural Appraisal.* New York: Harper & Bros., 1952. Pp. xiv, 498.

This is a collection of papers prepared for and discussed at the Eleventh Conference on Science, Philosophy and Religion, held in New York City in September 1950. Although the editors have reserved the right of using each paper as a basis for a chapter, more or less rigorously edited, this symposium suffers from the usual professional disease: uneveness of contributions, in size and import. Also, in the cold printed word, the impact of many contributions is undoubtedly less than during the original presentation and group discussion. Yet, the present volume is a valuable, concise restatement of the best American thinking on important ideological and executive aspects of world organization. The focus of the material is naturally on the periphery of comparatist interests. Some contributions, however, especially those touching upon the problems of communication and misunderstanding due to language and cultural differences (such as the first essay by Professor Quincy Wright of Chicago), bring out in a different context one of the perennial problems of comparative law. Beyond the area of immediate interest, the volume is a worthwhile contribution to that mutual understanding and lowering of institutional barriers, in which comparative legal studies are increasingly sharing.

JARO MAYDA

COOPER, F. E. *Effective Legal Writing.* Indianapolis: Bobbs-Merrill Co., 1953. Pp. x, 313.

Every branch of science and every professional technique stimulates the creation of a specialized language.

This also occurs in the case of law. On the other hand, the genius of jurists is called upon to express itself through the use of simple but most precise language, since it has to minimize the distance separating the technical language from what a layman can understand.

This problem exists everywhere, but not all countries have given it equal attention. American legal literature certainly devotes a most intelligent effort to avoid the fatal tendency of thinking in relaxed stereotyped formulae and to become mere routine. This is illustrated by the excellent work of F. E. Cooper, which retains all the liveliness of its origin, since, as the author tells us, "one such course [in legal draftmanship] has been offered by the writer for the last few years at the University of Michigan Law School."

The first part of the work treats the problems arising in the drafting of papers and documents. The second part contains the case material proper. The first part is the more extensive and more important, so much so that the second is in effect a practical appendix. The suggestive observations contained in the first part are of value even outside of the Anglo-American legal system, enabling us to take account of the extent to which laws are divided, not only by different concepts and legal rules, but also by that part of the practical presentation of each problem which evinces the tendency to crystallize in formal ceremony. Beyond the procedural or formulary peculiarities of each system, there exists the unity of the struggle for legal reason, which is that of enabling what is expressed to prevail over what is no more than a means of expression. JOSÉ PUIG BRUTAU

COATES, G. R. *Law and Practice in Chattel Secured Farm Credit.* Madison: The University of Wisconsin Press, 1954. Pp. xi, 105.

This is a short and readable treatise on "the prevailing commercial practices in farm credit, the relation of these practices to existing law, and finally, the relationship of these practices to the proposed Uniform Commercial Code." This specialized topic is limited by localization of the study to a single geographical area, the State of Wisconsin.

Although Mr. Coates announces this as a study of "law-in-action," empirical evidences of the actual practice in chattel secured farm credit are referred to sparingly, albeit at significant junctures, while the substantial portion of the work deals critically with the present law relating to the subject and the changes in that law which would be effected by adoption of the Uniform Commercial Code.

Employment of the empirical method is of growing importance in the field of law. The validity of such an approach is shown by Mr. Coates, e.g., after outlining the statutory procedure for foreclosure of chattel mortgages, he states that not a single banker interviewed could recall such a proceeding. In practice, there is a "voluntary surrender" of the mortgaged chattel concomitant with the execution of an agreement covering any excess or deficiency in the amount due under the contract of sale in relation to the price subsequently realized by the vendor on a sale after the retaking. This is illuminating, and leads one to regret that the author did not incorporate more of the actual facts of practice in this area of the law in his work. JOHN QUINN

LÜBTOW, U. v. *Reflexionen über Sein und Werden in der Rechtsgeschichte.* Berlin: Duncker & Humblot, 1954. Pp. 61.

In this booklet, the author, professor of law at the Free University of Berlin, examines the present value of legal doctrine (*Rechtssatz*) and its possibilities of development in the future; assuming the historicism of legal concepts, he concerns himself with their intrinsic dynamics.

Declaring that legal history must

needs be *Geistesgeschichte*, the author conceives of law not as command, issued by a higher power, but as a summation of historically conditioned rules, a conclusion, as it were, from certain premises representing former practical situations, given facts, decisions of individual cases, and proposed solutions of related problems. *Per se* no doctrine of law (*Rechtssatz*) handed down by tradition necessarily has to be preserved for the future. The present generation has the task of examining its value and judging whether its further application can be justified even at the price of a change of content. Old errors do not become new truths simply by ripening and becoming venerable. With the help of historicism, we may be able to free ourselves from too much history,—in life, in politics, and in law.

ROBERT RIE

ROTHENBERG, S. *Copyright and Public Performance of Music.* The Hague: Martinus Nijhoff, 1954. Pp. 188.

This is the most thorough comparative study yet made of the problem of public performance rights in music. The work covers not only the history of Performing Right Societies in the United States but offers a comprehensive survey of European copyright law and public performing right problems in most European countries. In addition, it includes some valuable appendices, such as various ASCAP antitrust consent decrees, ASCAP membership contracts, BMI consent decrees, BMI contracts for writers and publishers, and numerous others. The book is authored by a recent Harvard Law School graduate, who secured a Fulbright Scholarship from the U.S. Educational Foundation in the Netherlands for this purpose. The work constitutes, in this writer's opinion, one of the most important studies thus far published in the field of international comparative copyright law.

W. J. D.

DELAUME, G. R. *American-French Private International Law.* New York: Columbia University, 1953. Pp. 78.

This is the second in the series of bilateral studies in private international law sponsored by the Parker School of Foreign and Comparative Law of Columbia University. The first, by Professor Arthur Nussbaum, dealt with American-Swiss law, and was reviewed in an earlier edition of this Journal.[1] Unlike American-Swiss relations, United States relations with France as respects such critical problems as dual nationality, domicil, the right of aliens to work, recognition and enforcement of foreign judgments, and, generally, the applicable conflict of laws rules, depend upon the respective municipal laws. Few American-French treaties deal with matters of private international law; the major agreement is the Consular Convention of February 23, 1853.

The present study includes analyses and comparison of the significant rules of law that apply in the United States and France in such areas as Nationality, Domicil, and Aliens; Taxation and Corporations; Qualification and Renvoi; Personal Status; The Administration of Estates; The International Jurisdiction of Courts and the Recognition of Foreign Judgments and their Enforcement; Divorce; and Depositions of Testimony Abroad and Proof of Foreign Law. The citations to the source material, both American and French, are extremely valuable. A copy of the Consular Convention is appended. A table of cases, of great value to the lawyer concerned with French-American relations, is included, as is a short index.

In undertaking to specify in detailed fashion, the points on which French law and American law are in agreement and disagreement, the author has made a highly significant contribution. It was, assuredly, not a simple task, for the essentially different French

[1] Volume I, p. 295.

and American judicial systems make comparison rather difficult. This is not, of course, an academic exercise in comparative government. It is a reasonably thorough survey of the laws of both nations which affords a basis for the solution of legal problems with which the international practitioner might be concerned. To the extent that the survey furthers our knowledge of comparative jurisprudence, it is noteworthy. To the extent that a bilateral study such as this points up the areas of misunderstanding which require further agreement and refinement, a commendable task has been completed.

HILLIARD A. GARDINER

VANDERBILT, A. T. *The Doctrine of the Separation of Powers and Its Present-Day Significance.* The University of Nebraska Press, 1953. Pp. 144.

That the doctrine of the separation of powers is not an empty shell is the subject of Chief Justice Arthur Vanderbilt's lectures, the second in the series established in honor of Roscoe Pound by members of the Nebraska State Bar Association and alumni and friends of the University. Justice Vanderbilt's analysis is divided into three parts: (1) The Doctrine of the Separation of Powers Viewed Comparatively and Historically, (2) The Dominance of the Federal Government over the States and of the Federal Executive over the Legislative Branch as a Threat to the Doctrine and to Constitutional Government, and (3) Judicial Deference as a Grave Cause of Constitutional Imbalance.

In Part (1) attention is devoted to foreign conceptions. The Soviet Union is said to not have a separation of powers but a distribution of functions. To the absence of sanctions against presidential government in the Weimar Constitution, blame for the ascendance and despotism of Hitler is attributed. To the distrust with which judicial interference came to be regarded in France is ascribed their consequent constitutional separation of judicial and administrative functions and jurisdictions. In a survey of the written constitutions of twenty Latin-American nations, it is found that all subscribe to the doctrine of separation of powers but that the reason why power has been concentrated and individual rights impaired is that these countries have a long history of revolts and revolutions, as a result of which strong military leaders have achieved power through means outside the framework of the established government. Following the survey of constitutional doctrine in these many countries, Justice Vanderbilt observes that there is no more depressing a fact than the lack of understanding to be found in regard to the relation between the separation of powers and the rule of law, and the relation between the rule of law, as a substitute for force and tyranny, and individual freedom and the dignity of man.

The thesis of Part (2) is that the overwhelming growth in size and power of the executive branch of the federal government in comparison with the other two great departments has been the outstanding American political phenomenon of the twentieth century. Not only is the executive branch of the federal government expanding enormously, but it increasingly encroaches on fields that have always been considered the domain of state and local governments or of private interests, it is argued. Justice Vanderbilt concludes on this point that Congress may ameliorate the trend toward centralization due to the excessive vesting of power in the executive arm of the Federal government, and return to the states functions that they can exercise more efficiently.

In Part (3), Judicial Deference as a Grave Cause of Constitutional Imbalance, reference is made to the weakness, by nature, of the judicial branch, and to the impairment of judicial independence by legislative encroachments, executive interference,

and judicial inaction. Has the time not come, it is asked, for a reconsideration of the propriety of the entire doctrine of judicial deference, if the balance contemplated by the Constitution is to be recovered? The responsibility for the growth of federal powers at the expanse of the states and for the increase in the powers of the executive branch of the federal government rests, it is urged, on the Congress and on the federal judiciary.

HILLIARD A. GARDINER

DRINKER, H. S. *Legal Ethics*. New York: Columbia University Press, 1953. Pp. xxii, 448.

It is fortunate indeed that as significant a subject as this has finally been deemed worthy enough for the full-dress treatment it has received in this book. That legal ethics is at least a "branch of moral science which treats of the duties which a member of the legal profession owes to the public, the court, to his professional brethren, and to his client" is a definition to which Henry Drinker lends considerable substance in this work, published under the auspices of The William Nelson Cromwell Foundation.

In two parts, entitled respectively "Organization of the Bar and of Disciplinary Proceedings" and "The Duties and Obligations of Lawyers," the book discusses many problems: in part one, the history of the Bar in England and the United States, sanctions of professional conduct, disciplinary proceedings; in part two, the duties and obligations of lawyers, the lawyer's obligations to his client, the lawyer's obligations and relations to other lawyers, advertising and solicitation, and the Canons of Judicial Ethics. The appendices contain many items: decisions by the American Bar Association Ethics Committee Hitherto Unreported, a digest of representative court decisions specifying grounds for disbarment, suspension or censure, the Canons of Professional Ethics, the Canons of Judicial Ethics, Hoffman's Fifty Resolutions in Regard to Professional Deportment, the Code of Ethics of the Alabama State Bar Association, and Rules and Standards as to Law Lists. A thorough index of works cited, of cases quoted, of committee decisions (of the American Bar Association), published and hitherto unpublished, and an index are included.

"It is needful," said Justice Stone, "that we look beyond the club of the policeman as a civilizing agency to the sanctions of professional standards which condemn the doing of what the law has not forbidden." To a fuller understanding of these standards, Henry Drinker's "Legal Ethics" will unquestionably and definitively contribute.

HILLIARD A. GARDINER

BONTECOU, E. *The Federal Loyalty-Security Program*. Ithaca: Cornell University Press, 1953. Pp. xi, 377.

This is the last in the series of books made possible by a grant from The Rockefeller Foundation to Cornell University for the purpose of studying the impact of governmental programs designed to ensure internal security upon our civil liberties. The book has eight chapters, dealing respectively with the origins of the program, the mechanics of adjudication, the problems of investigation, the decisions and their effect, the Attorney General's list, legal tradition and due process of law, a summation, and the English policy. The voluminous appendices contain executive orders; statutes and regulations relating to the employment, dismissal, and investigation of employees of the Executive Branch of the Federal Government; extracts from exhibits accompanying the report of the President's Temporary Commission on Employee Loyalty (1947); a copy of a memorandum prepared by the Director of the Federal Bureau of Investigation dealing with the Training of Special Agents of the FBI for the investigation of loyalty cases; the Attorney-Gener-

al's List; and a listing of subversive organizations. The book evidences a considerable amount of painstaking research; as such it would appear to be a definitive treatment of the problem, which is handled with as much insight and objectivity as could be reasonably expected, considering the somewhat explosive nature of the material.

Of particular comparative interest is the chapter on English policy in these matters. While the standard in the United States was initially "whether grounds exist for belief that a person is disloyal," and subsequently "whether there is reasonable doubt of loyalty," the more specific British standard, "whether one is a communist or so associated with the Communist party (or presumably, a Fascist organization) as to raise legitimate doubts as to his reliability," tends, at least in its application, in the author's view, to assure the exercise of increased safeguards. Moreover, while until recently the security program (going to the question of an employee's fitness) operated alongside the loyalty program (going to the question of allegiance to the United States) in the United States, the British have limited their program to the narrowly defined security issues. In England, the principle of ministerial responsibility also functions and provides a channel for publicity and criticism by means of the practice of questioning cabinet members in Parliament. It is Miss Bontecou's contention that the British, through a simple *ad hoc* program, have with equal success coped with the problem of subversion, and have avoided the stigmatization of individuals with judgments of disloyalty, by directing their determinations to the sole question whether a particular individual is unsuitable for a particular post.

HILLIARD A. GARDINER

VAN DIEVOET, E. *Catalogue de la Bibliothèque Internationale des Assurances de Louvain.* Louvain: Assurances du Boerenbond Belge, 1954. Pp. xv, 447.

This volume is a highly useful bibliography of the science and technique of insurance. It covers the material, 9 million volumes, of the international library of insurance, which has been established in Louvain with the help of the University of Louvain and the Society of the *Assurances du Boerenbond Belge.* The volumes represent the entire field of insurance; works on actuarial science, on the business and organization of insurance, and on the law of insurance, collected on a widely international basis and kept up-to-date, offer valuable source material. The organization of the *Catalogue* facilitates research in any specialized subject relating to insurance; the volumes are listed with the place and date of publication and the names of the publishers. They are printed under the main headings of private insurance, social insurance, mathematics, statistics, and medicine. Of special interest to lawyers is the collection on civil responsibility, contractual and quasi-contractual, comprising a large collection of works on fault, risk, and reparation of damages. V. B.

HUGHES, C. *The Federal Constitution of Switzerland* Oxford: At the Clarendon Press, 1954. Pp. 223.

This useful work contains a new English translation of the full Swiss Constitution (with the German text in an appendix), the law of 1902 on the relations between the Councils, and the Full Powers Arrêté of August 30, 1939, accompanied by an extensive running commentary, alphabetical analyses of the texts, a select bibliography, and an index. H. E. Y.

GRISWOLD, E. N. *The Fifth Amendment Today.* Cambridge: Harvard University Press, 1955. Pp. vi, 82.

The three lectures in this booklet, dealing with the conception of due process and in particular the privilege

against self-incrimination as an essential means to protect individual liberty, deserve the attention of lawyers and laymen as an objective analysis of critical problems of human rights today.

HOWELL, P. P. *A Manual of Nuer Law.* International African Institute. New York: Oxford University Press, 1954. Pp. xv, 256.

This manual, published for the International African Institute, was prepared primarily for administrative officers by a member of the Sudan Political Service, also trained in anthropology, who has included in this work the results of his researches in native culture. This volume, consequently, is not merely a valuable addition to the literature on the Nuer, a Nilotic people in the Upper Nile Province in the Anglo-Egyptian Sudan, but also a contribution of considerable anthropological and comparative interest for students of "primitive" law. After an introduction covering the historical and topographical background of the Nuer and their social and political organization, a detailed account, exemplified by numerous cases, is given of the native law and custom administered in the Nuer tribal courts, with chapters on homicide and bodily injuries, marriage and divorce, violation of rights in women, property rights, and succession, religious concepts in relation to law. The concluding chapter on the nature of Nuer Law is of special interest as reflecting the effect on native custom of the establishment of courts and the beginnings of codification. There are also two appendices, a glossary, a bibliography, and an index. H. E. Y.

HSIEH KWAN-SHENG. *A Brief Survey of the Chinese Constitution.* Taipei, Taiwan, China: China Cultural Service, 1954. Pp. 80.

This pamphlet contains the text in English of the Constitution of the Republic of China, as adopted on December 25, 1946, with a bibliography and a brief survey in Part I of the "five-power" constitutional theories of Dr. Sun Yat-sen, followed in Part II by a concise exposition of the background and main features of the Constitution. Of particular interest is the explanation of how the traditional legislative, executive, and judicial powers are related to the co-ordinate powers of examination and control, as means of representative government. H. E. Y.

STURGES, W. A. *Cases on Arbitration Law.* New York: Matthew Bender & Co., Inc., 1953. Pp. 912.

This work by the author of the leading American treatise on commercial arbitration makes available a most useful collection of cases exemplifying the typical complications relating to arbitral agreements, proceedings, and awards, which give rise to litigation in the United States, and occasionally footnoted to foreign experience. The value of the work is enhanced by appendices reproducing the New York and Federal Arbitration Acts, and the Rules of the American Arbitration Association for Commercial and Labor Arbitration, and by an index. H. E. Y.

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Mention in this list does not preclude a later review

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Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

REPORTS

SESQUICENTENNIAL CELEBRATION OF THE *CODE NAPOLÉON*—The first 150 years of the *Code Napoléon* were celebrated at The New York University School of Law, December 13 to 15, 1954, by a conference in three sessions on "The French Code and the Common Law World, 1804–1954." The theme of the first session, presided over by Pierre Donzelot, permanent Representative in the United States of the French Universities, was: The Code—Background, Technique, and Expansion; that of the second session, presided over by Ivan Kerno, of the United Nations: The Code and Contemporary Problems; and that of the third session, chaired by Russell D. Niles, Dean of the School of Law, New York University: Codification and the Common Law World. Papers were read by: Carl J. Friedrich, of Harvard University, on "The Ideological and Philosophical Background of the Code;" Boris Mirkine-Guetzévitch, of the French University of New York, on "The Code and Human Rights;" André Tunc, of the University of Grenoble, on "The Grand Outlines of the Code;" Angelo Piero Sereni, of the University of Ferrara and New York University, on "The Code and the Case Law;" Sheldon Elliott, of New York University, on "Techniques of Interpretation;" Jean Limpens, of Ghent University and the University of Brussels, on "Territorial Expansion;" Max Rheinstein, of the University of Chicago, on "The Code and the Family;" Claude Lewy, of the French University of New York, on "The Code and Property;" Arthur T. von Mehren, of Harvard University, on "The Code and Contract;" Walter Derenberg, of New York University, on "The Code and Unfair Competition;" Nicola Stjepanovitch of the University of Belgrade, on "The Code in a Socialist State;" Bernard Schwartz, of New York University, on "The Code and Public Law;" Roscoe Pound, of Harvard University, on "Codification in Anglo-American Law;" Jack B. Tate, of Yale Law School, on "Codification and International Law;" Benjamin Akzin, of Hebrew University, Jerusalem, on "Codification in a New State;" J. H. Tucker, Jr., President, Louisiana Law Institute, on "The Code and the Common Law in Louisiana;" Thibaudeau Rinfret, retired Chief Justice of the Supreme Court of Canada, on "The Lessons for the Common Law World of 150 Years of the French Code;" and Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, on "The Reconciliation of the Civil Law and the Common Law."

The celebration was arranged by the Institute of Comparative Law of New York University, Bernard Schwartz, director, in collaboration with the Cultural Services of the French Embassy and the French University of New York. The proceedings will be published.

SESQUICENTENNIAL CELEBRATION OF THE FRENCH CIVIL CODE—Under the sponsorship of the Louisiana Historical Society and in collaboration with the Louisiana State Bar Association, the Louisiana State Law Institute, and the law schools of Tulane, Louisiana State, and Loyola Universities, a program in the nature of a Sesquicentennial Celebration of the *Code Napoléon* was held on December 14, 1954, in the Sala Capitular of the Cabildo, New Orleans, Louisiana. The program marked the formal opening of a special exhibit loaned by the Library of Congress containing important source materials of

the French Civil Law, which collection was placed on exhibition by the Louisiana Historical Society for several weeks. Included in the exhibit were the Royal Ordinances, the Customs of Paris and French provinces, the *Corpus Juris Civilis* and muniments of Roman law, the works of eminent French jurisconsults, precodal drafts of the Code, *Procès Verbaux* of the Commissions and of the *Conseil d'Etat* and first editions of the *Code Civil des Français* (1804), the *Code Napoléon* (1807), the Codes of Louisiana, and the codes of other civil law jurisdictions.

Edward A. Parsons, President of the Louisiana Historical Society, presided. Papers were delivered by Honorable John B. Fournet, Chief Justice, Supreme Court of Louisiana: "The Civil Code in Louisiana Jurisprudence;" Honorable Guy Quoniam de Schompré, Consul General of France: "Tribute of France;" Thomas W. Leigh, President, Louisiana State Bar Association: "Our Civil Law Heritage;" Ferdinand F. Stone, Professor of Law, Tulane University: "Legal Education at Tulane on The Code Napoleon;" Joseph Dainow, Professor of Law, Louisiana State University: "Civil Code Revision;" Brendan F. Brown, Professor of Law, Loyola University: "The Contribution of the Code Napoleon as an Implementation of the Natural Law." Ray Forrester, Paul M. Hebert, and A. E. Papale, deans, respectively, of the law schools of Tulane, Louisiana State, and Loyola Universities, introduced portions of the program, and the official welcome, on behalf of the New Orleans Municipal Council, was delivered by Victor H. Schiro. The meeting was attended by members of the Louisiana Historical Society, members of the bar, and representatives from the Louisiana law faculties.

ASSOCIATION OF AMERICAN LAW SCHOOLS, COMMITTEE ON COMPARATIVE LAW—At the Annual Meeting of the Association of American Law Schools held in New York City, December 28 to 30, 1954, the Committee on Comparative Law held a joint meeting with the American Foreign Law Association to discuss "Problems in Proving Foreign Law in Courts in the United States." Dr. Martin Domke, New York University, spoke on "The Role of the Expert Witness of Foreign Law" and Professor Rudolf B. Schlesinger, Cornell University, discussed "The Cross-Examination of Expert Witnesses on Foreign Law." Professors Oliver P. Schroeder, Jr., Western Reserve University, and John N. Hazard, Columbia University, presided.

INSTITUTE OF INTERNATIONAL LAW—The 46th session of the Institute was held in Aix-en-Provence, April 22 to May 1, 1954, Albert de Lapradelle presiding, with the late Arthur K. Kuhn, New York, and Haroldo Valladão, Rio de Janeiro, as vice-presidents. In the field of private international law, resolutions were adopted on (1) Immunity of Foreign States from Jurisdiction and Executions, (2) Tax Laws in Private International Law. Among associate members elected to full members of the Institute are Edwin D. Dickinson, Philadelphia, and Green H. Hackworth, The Hague. Hans Kelsen was made an honorary member and Charles de Visscher an honorary president. The new president of the Institute is José de Yanguas Messia, Madrid. The next session will be in Spain.

ANNOUNCEMENT

INTER-AMERICAN ACADEMY OF COMPARATIVE AND INTERNATIONAL LAW—The sixth session of the Inter-American Academy of Comparative and International Law, Havana, Cuba, will be held from January 31 to February 12, 1955. Six courses, consisting of five lectures each, will be offered, namely, Conflict of Laws, by Professor Albert A. Ehrenzweig, of the University of California; Medicine and Law: A New Frontier Opens, by Professor Oliver Schroeder,

Jr., of Western Reserve University; Democracy and Human Rights (in Spanish), by Professor Luis Bossano, of the Central University of Quito, Ecuador; Modern Problems of Family Law (in Spanish), by Dr. Enrique Diaz de Guijarro, formerly of the University of Buenos Aires; Matrimonial Regimes (in Spanish), by Professor José Guerra Lopez, of the University of Havana; Legal Relations in Inter-American Relations (in Spanish), by Dr. Antonio Gomez Robledo, formerly of the National School of Law of Mexico. Further information will be furnished by the director of the Academy, Dr. Ernesto Dihigo, Aguiar No 556, Havana, Cuba.

AMERICAN FOREIGN LAW ASSOCIATION

Organized in New York on February 24, 1925, the American Foreign Law Association has as its objects: the advancement of the study, understanding, and practice of foreign, comparative, and private international law, the promotion of solidarity among members of the legal profession who devote themselves, wholly or in part, to those branches, the maintenance of adequate professional standards relative to such members, and active co-operation with learned societies, devoted to such subjects (Constitution, as revised, October 17, 1952, this *Journal*, Vol. 2 (1953) page 294).

Active membership is open to any one of good moral character, who, besides manifesting a special interest in the objects of this Association, (a) has been duly admitted to practice before the Federal Supreme Court or the highest courts of a state, territory, or possession of the United States; or (b) is a member in good standing of the Bar of a foreign country, or holds a University degree entitling him to apply for admission to a Bar, or who is otherwise specially qualified in any branches of law to which the Association is devoted.

The Association has branches in Chicago and Miami.

The affairs of the Association are managed by a General Council elected as stated in the Constitution. The Council selects a president, two or more vice-presidents, a secretary and a treasurer, who perform the duties implied by their respective titles for the Association as a whole as well as for the Council.

The General Council is composed of: Martin Domke, New York, Phanor J. Eder, New York, Victor C. Folsom, New York, David E. Grant, New York, Jerome S. Hess, New York, Kurt H. Nadelmann, Cambridge, Mass., Max Rheinstein, Chicago, Ill., Otto Schoenrich, New York, Angelo Piero Sereni, New York, Harold Smith, New York, David S. Stern, Coral Gables, Fla., Arthur T. von Mehren, Cambridge, Mass., and the administrative officers.

Officers are: Otto C. Sommerich, New York, president; Alexis C. Coudert, New York, John N. Hazard, New York, Hessel E. Yntema, Ann Arbor, Mich., vice-presidents; Robert R. Boot, New York, treasurer; Albert M. Herrmann, One Wall Street, New York 5, N. Y., secretary.

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